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CONTENTS

ARTICLES

COMMENTS

RECENT DECISIONS

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NEXT ISSUE:

125TH ANNIVERSARY COMMEMORATIVE ISSUE

The year 1973 marks the 125th anniversary of the founding of the University of Mississippi. Over the years, the University and her sons and daughters have compiled a proud record of significant contribution to Mississippi and the Nation. In appreciation of this legacy, we are dedicating the September issue (Volume 44, Number 4) of the MISSISSIPPI LAW JOURNAL to the University and her outstanding graduates. This special commemorative issue will be composed exclusively of articles authored by University of Mississippi School of Law graduates who are esteemed members of the teaching profession. These authors and their articles include:

MESNE PROCESS IN THE EARLY AMERICAN COLONIES ..... *Professor Nathan Levy, Jr.*
University of Connecticut School of Law

THE LAW AND ETHICS OF ORGAN TRANSPLANTS ..... *Professor Jerome F. Leavell*
William & Mary College
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MOTIVE OR PURPOSE AND ACTS OF CONGRESS ..... *Professor Hector Currie*
Louisiana State University School of Law

PSYCHOLOGICAL FUNCTIONS IN THE TEACHING OF CRIMINAL LAW ..... *Professor Samuel M. Davis*
University of Georgia School of Law

RESTATEMENT (SECOND) AND THE LAW OF CONDITIONS IN CONTRACTS *Professor Robert Childres*
Northwestern University School of Law

TORT LIABILITY IN OIL AND GAS OPERATIONS ..... *Professor Arthur B. Custy*
University of South Carolina School of Law

REPRESENTING THE UNREPRESENTED: A DECENNIAL REPORT ON PUBLIC-INTEREST LITIGATION IN MISSISSIPPI

Francis B. Stevens and John L. Maxey, II***

Introduction

On September 13, 1972, a federal district court entered its first order in a class action seeking sweeping reforms at the Mississippi State Penitentiary at Parchman.[1] The court's findings of fact and conclusions of law signaled the beginning of the end for a variety of dehumanizing and unconstitutional practices to which the inmates have been subjected in years past: racial discrimination; cruel and unusual punishment; living quarters unfit for human habitation; an exploitive trusty system; denial of proper care, medical treatment and feeding; denial of due process in the administration of punishment; arbitrary censorship of mail; and denial of access to courts, public officials, and attorneys of record.

On January 28, 1971, the Fifth Circuit Court of Appeals ordered the Town of Shaw to submit a plan for the district court's approval outlining how it proposed to remedy the results of a long history of racial discrimination in the distribution of its municipal services: street paving; street lights; sanitary sewers; surface water drainage facilities; water mains; fire hydrants; and traffic control devices.[2]

The deplorable conditions at Parchman are not of recent origin. The same is true of the municipal services and facilities in Shaw. The disparity was no greater when the case was presented to the court than it had been over the years. Why then do the State of Mississippi and the elected officials of Shaw suddenly find themselves under court order to implement drastic reforms? The answer is simple. The inmates at Parchman and the black citizens of Shaw finally secured legal rep-

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*A.B. 1942, J.D. 1951, University of Mississippi. Acting director, North Mississippi Rural Legal Services.

**A.B. 1965, J.D. 1968, University of Mississippi. Director, Community Legal Services of Mississippi, Inc. The authors acknowledge with thanks the research assistance of Kirk Leswing, Tom Ginger, and Ron Welch in the preparation of this article.

[1]Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972).

[2]Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972).

resentation. They finally got lawyers who were ready, willing, and able to spend several years and thousands of dollars to conduct the much needed litigation. The penitentiary will never be the same again, nor will Shaw, nor will the State of Mississippi.

Both suits effectively illustrate the work of public interest lawyers in Mississippi. Similar changes have been wrought by litigation in other fields: first amendment rights have been established and enforced; schools have been desegregated; voting rights have been secured; welfare rights have been delineated; employment discrimination has been challenged; police brutality and racial discrimination in jury selection have been challenged; and the Mississippi Highway Patrol has been desegregated.

The changes that lawyers and judges are making in Mississippi are a microcosm of those which are occuring in the nation as a whole. The practice of law is facing the challenge of a new dimension of professional responsibility.

I. The Lack of Available Counsel

The significance of this phenomenon is readily apparent: groups which were without legal counsel are now being represented, thus remedying, at least in part, a fatal defect in our system of justice. The nature of our judicial system is such that both sides must be represented if the system is to work properly. Even detractors of litigation as a means of effecting social change agree on the nature of the problem. One such critic, Geoffrey C. Hazard, Jr., has described the problem as follows:

> There can be little question that the procedure of courts and many administrative tribunals does work unfairly on anyone who is unable either effectively to assert legal rights on his own behalf or to employ a lawyer for that purpose. The procedure of most all courts and of many agencies is based upon the adversary system. In the adversary system, the parties have the opportunity and responsibility for developing and presenting the relevent facts and legal contentions, while the adjudicator is supposed to be an essentially passive being. If the parties lack capacity to exercise this opportunity in an effective way, their claims cannot be presented in the way contemplated by the system. Yet, even where it is evident that the parties lack capacity to do this — as is typically true of the poor — the adversary structure is adhered to, and ineffective parties are allowed to suffer their fate. The result is a conflict between the system's

> pretension and its fulfillment, which may be taken as one working definition of procedural injustice.[3]

When the people who are unrepresented constitute large segments of our society, the "conflict between the system's pretention and its fulfillment" is multiplied many times over.

The bar has always recognized its obligation to serve the public. Our canons of ethics are based on the premise that the interests of the public are paramount. If the name of our new Code of Professional Responsibility implies it, the preamble to the Code states it clearly:

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.[4]

This article will deal with the groups of people[5] in Mississippi whose individual rights have for years been "subject to unrestrained power" and with the lawyers who have worked to do something about it. Although their representation has been of minority groups,[6] the work has actually inured to the benefit of the public as a whole. That is, by affording representation to those who have previously gone unrepresented, the public-interest lawyers are restoring respect for the law and are thereby making "rational self government" possible.

The phrase "in the public interest" is a nebulous one.[7] The difficulty in definition comes at the point of determining what is or

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[3]AMERICAN BAR FOUNDATION, SOCIAL JUSTICE THROUGH CIVIL JUSTICE (Series on Legal Services for the Poor 1964) [hereinafter cited as SOCIAL JUSTICE]. In one sense this article is a response to Mr. Hazard's monograph, the thrust of which was to criticize the use of the judicial process as a means of effecting social change. In the writers' opinion Hazard's contention that litigation is not the best way to achieve social justice begs the question. For people who are without power, litigation frequently is the only available remedy. *See* NAACP v. Button, 371 U.S. 415 (1962).

[4]ABA, CODE OF PROFESSIONAL RESPONSIBILITY 1 (1970).

[5]The emphasis is on group representation, bearing in mind that private practitioners also represent groups of people with common interests, like business corporations and labor unions.

[6]The term minority groups as used in this article means the groups in our society who are without power: racial minorities, the poor (as a subcultural group), and students.

[7]The writers have refrained from using the phrase *pro bono publico*. The term means different things to different people. *See* F. MARKS, THE LAWYER, THE PUBLIC AND PROFESSIONAL RESPONSIBILITY 1-45 (1972) (an American Bar Foundation Study).

is not in the public interest. All too often the public interest has been interpreted to mean that which nets both the client and his lawyer the highest incomes. Years ago, Mr. Justice Brandeis questioned whether the practice of law has become more of a trade than a profession.[8] The answer to that question during the remainder of this century may very well depend upon the continued development of the present trend toward affording quality representation to the groups in our society that have previously gone unrepresented. If this small but significant trend continues, our adversary system will have the opportunity to work as it should.

Until recently, however, the trend had definitely been going the other way. The increasing size and complexity of business, resulting in more and more specialization by lawyers, the trend toward larger and larger law firms, and the increasing adoption and use of minimum fee schedules[9] have contributed to the strong representation of private interests, to the exclusion of public interests except via the vehicle of government.[10]

One must inevitably conclude that the practice of law is a public utility. It is a monopoly protected by law. Instead of being regulated by a governmental agency, however, our own particular public utility is self-regulated. Our canons of ethics explicitly state that a lawyer may choose whom he will represent as a client. Ethical Consideration 2-26 of the new Code of Professional Responsibility encourages the representation of those not otherwise represented, but it is persuasive only. As Marks has expressed it: "There are no disciplinary procedures for the lawyer who refuses to take a case . . . The absence of controls over the lawyer with respect to what he turns away is socially dangerous."[11] By our own inaction and indifference, lawyers are allowed, without legal or even moral sanction, to defeat the objectives of our judicial system by failing or refusing to furnish counsel to the groups in our

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[8]The whole area of the lawyer's professional responsibility has been examined exhaustively by the American Bar Foundation. Mr. Justice Brandeis' prophetic writings are discussed in Chapter 1 of the ABF Study. *Id.*

[9]The ABF study makes the point that "By adopting a minimum fee schedule—the legal profession defined a group which could not afford services." *Id.* at 17.

[10]This article has to do with the public interest work of lawyers in the private sector, including those who work for the OEO funded programs, whose grants are made to private non-profit entities, and whose clients are private individuals and groups. Nothing herein is intended to demean the work of public interest lawyers who work for governmental agencies. They are simply in a different category. The interests of minority groups and governmental agencies may or may not coincide. Most of the time they do not. Governmental agencies usually respond to the majority.

[11]F. MARKS, *supra* note 7, at 290.

society who are without the money to pay our fees or whose cause is politically unpopular.[12]

The issue, however, is more complex than mere individual inaction and indifference. The particular way in which our legal system has developed makes it a practical impossibility for lawyers to represent competing political and economic interests. Lawyers tend to identify with their clients. Those who handle negligence cases usually represent either plaintiffs or defendants, but not both; a trend which has led to the formation of special interest bar groups which espouse the particular political philosophy of their constituencies. The public-interest lawyers are following the same pattern.[13] The continued development of the new public-interest law groups is therefore a practical necessity if our system of justice is to be anything more than a mockery of the word itself.

Public-interest practice in Mississippi was born out of agonizing necessity. It was not a mere fortuity that the plaintiffs in major cases involving prison reform and equalization of municipal services suddenly found themselves with advocates in federal court. Events in ostensibly unrelated substantive areas—the manner in which the Supreme Court of the United States chose to implement the principles enunciated in *Brown v. Board of Education*[14] *(Brown II),* and the decision of the Court in *NAACP v. Button*[15]—occurred making *Gates* and *Hawkins* possible.

In *Brown II,* by leaving desegregation to individual school boards, with each district court "supervising" and "approving" their action, the Court assumed the use of our adversary system which depends upon the availability of counsel for both sides if it is to work properly.[16] *Button* arose because of the dearth of available counsel to represent

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[12]Representation of unpopular clients and causes is not new. John Adams set the stage for it before this country was ever born. The American Civil Liberties Union has had a long and illustrious history of defending the principle that every person, no matter how unpopular, is entitled to his day in court. In spite of these precedents, however, the growing complexity of our socio-economic system has allowed whole groups of people to suffer injustices because of their lack of representation.

[13]The National Legal Aid and Defender Association is made up of staff lawyers in legal services programs and public defender offices. Philosophically, the National Lawyers Guild is further to the left. The National Conference of Black Lawyers is primarily concerned with issues affecting the rights of black people.

[14]349 U.S. 294 (1955).

[15]371 U.S. 415 (1962).

[16]The alternatives open to the court were discussed in Lelflair & Davis, *Segregation in the Public Schools,* 67 HARV. L. REV. 377, 392 (1954).

black plaintiffs in school desegregation suits.[17] In order to enforce the *Brown* decision, the NAACP worked out a system of bringing interested parents in contact with NAACP staff lawyers. The usual procedure was for NAACP leaders to call or attend community meetings with groups of black parents who were interested in school desegregation. Parents who were willing to participate in the contemplated litigation would sign printed forms authorizing NAACP lawyers to represent them in appropriate enforcement cases. In Virginia and seven other states, including Mississippi, such procedures were prohibited by newly enacted or strengthened statutes prohibiting barratry, champerty, and maintenance. In the Virginia case leading to *Button*, the Virginia court described that state's statutes as being "parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees."[18] The Mississippi statutes were strengthened and reinforced in the same vein.[19]

In *Button* the Court held that the Virginia statute, as construed and applied by that state, violated the defendants' first amendment rights of assembly and petition for redress of grievances. The Court said:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the Courts.[20]

Further along in its opinion, the Court said:

> And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.[21]

Implicit in the Court's opinion in *Button* was its recognition that without some similar system of group solicitation and furnishing of staff counsel by the NAACP, its decision in *Brown* would never be implemented. In a masterpiece of understatement (or perhaps sarcasm) the Court said: "Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition of Virginia lawyers; the problem is

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[17]H. HOROWITZ & K. KARST, LAW, LAWYERS AND SOCIAL CHANGE 298-301 (1969).

[18]NAACP v. Pattey, 159 F. Supp. 503, 513 (1958).

[19]MISS. CODE ANN. §§ 2049-01 *et seq.* (1956).

[20]371 U.S. at 429.

[21]*Id.* at 440.

rather one of an apparent dearth of lawyers who are willing to undertake such litigation."[22]

Button also set the stage for various types of group legal services.[23] In the fields of poverty and civil rights, however, it was the lack of representation, particularly group representation, that was and still is the determining factor in the development of the public interest groups in Mississippi.

A. The "Farish Street"[24] Lawyers

The civil rights movement in Mississippi had coalesced and grown in strength even before the civil rights lawyers groups were formed. National attention focused on Mississippi with James Meredith's admission to the University of Mississippi in 1962, and with Medgar Evers' murder in 1963. Those events assured Mississippi of its role in the civil rights movement.

The earliest group of "Farish Street lawyers" was the NAACP Legal Defense and Educational Fund, Inc. (LDF), popularly referred to as the "Inc. Fund." Although the staff office in Jackson was not opened until the latter part of 1963, the Inc. Fund's presence in Mississippi had been felt long before. Its staff lawyers in New York had filed and prosecuted the suit for the desegregation of the University of Mississippi.[25] Working initially in association with the three black lawyers in Jackson (who were the only black practitioners in Mississippi at that time), the New York staff began the long and arduous task of implementing the *Brown* decision in the public schools of Mississippi.[26] The internship program of the Herbert Lehman Fund (a subsidiary of LDF) also produced the first racially integrated law firm in Mississippi[27] and provided the setting for the education and training of Mississippi blacks for civil rights practice in their home state.

In the spring of 1963, President John F. Kennedy called a conference of lawyers at the White House. The President spoke of the

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[22]*Id.* at 443.

[23]United Transp. Union v. Michigan, 401 U.S. 576 (1970); United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia Bar Ass'n, 377 U.S. 1 (1963); Note, *Group Legal Services and the Right of Association*, 63 MICH. L. REV. 1089 (1965). This group of cases resulted in amendments to the Canons of Ethics to allow for the Court's rulings. *See* the preface to the new Code of Professional Responsibility.

[24]The main street in the black commercial section of Jackson, Mississippi.

[25]Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962).

[26]Evers v. Jackson Mun. Sep. School Dist., 232 F. Supp. 241 (S.D. Miss. 1964).

[27]Anderson, Banks, Nichols and Leventhal; Jackson, Mississippi.

millions of black Americans, who, because of their race, received neither justice, equality, nor legal protection.[28] The conference resulted in the formation of the President's Committee for Civil Rights, later renamed The Lawyers' Committee For Civil Rights Under Law (LCCRUL). Referred to in its early days as the "President's Committee," LCCRUL was the most prestigious of the "Farish Street" lawyer groups. It was also mistakenly regarded as being the most financially secure.[29]

In the summer of 1964, James Chaney, Michael Schwerner, and Andrew Goodman were murdered in Neshoba County. That summer, the long, hot summer of 1964, LCCRUL undertook its first Mississippi project — to send volunteers into the state to represent clergymen and students working with CORE, SNCC, and COFO.

The same crisis and the same commitment and response of national leaders to the cause of civil rights also led to the formation of the Lawyers' Constitutional Defense Committee (LCDC). In the spring of 1964, in response to the pleas of the handful of black lawyers in Alabama, Louisiana and Mississippi, the chief legal officers of the nation's leading groups concerned with race relations, civil rights, and human rights, joined together to form LCDC. The General Counsel or chief legal officer of the NAACP, the NAACP Legal Defense and Educational Fund, Inc., the Commission on Religion and Race of the National Council of Churches, American Civil Liberties Union, The American Jewish Committee, The American Jewish Congress, Southern Christian Leadership Conference, Congress of Racial Equality, Student Nonviolent Coordinating Committee, and The National Catholic Conference for Inter-racial Groups formed the first Board of Directors of LCDC.[30] Both LCCRUL and LCDC decided to open litigating offices in Jackson — LCDC in the fall of 1964, and LCCRUL in the spring of 1965.

LCCRUL was the only group that sought to establish a working relationship with the Mississippi State Bar .The committee worked out an understanding that allowed its volunteers and staff to appear in Mississippi courts. The committee was to screen and select its volunteers on the basis of their answers to the same questionnaires used for evaluating appointees to the federal bench, and the volunteers were to be trained in Mississippi law, procedures, and ethics. LCCRUL viewed its new project essentially as missionary work. "Unfortunately," the committee said, "the unprecedented number of cases

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[28]LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ANNUAL REPORT, 1968-69.

[29]Actually the financial support of the NAACP Legal Defense and Educational Fund, Inc., was just as sound, if not more so.

[30]From an unpublished history of LCDC furnished to the writers by Alvin J. Bronstein, former chief staff counsel of the LCDC office in Jackson.

involving defendants who are both indigent and unpopular, and the lack of community understanding of the responsibilities of the Bar . . . leads to widespread local condemnation of those representing clients in civil rights matters . . . ."[31]

Two years later, in 1967, the Jackson office of LCCRUL had represented more than 1,500 clients and had a full time staff of five lawyers. Although the Committee had "sought a cordial relationship with the Mississippi Bar with the ultimate aim of transferring civil rights cases from the Committee to members of the Bar," little progress had been made toward that goal. The committee's relations with the Mississippi State Bar were characterized in the 1966 annual report as "good, though not intimate," but by the end of that year they had broken down. On December 1, 1966, complaining of violations of the "letter and the spirit" of the 1965 agreement under which the committee had opened the Jackson office, the bar withdrew its consent.[32]

The Mississippi bar's action apparently stemmed from the fact that the Jackson office had perceived the need for, and had commenced, affirmative litigation going well beyond criminal defense. The case of *Anderson v. Nosser*[33] had been filed, seeking civil damages for the 1965 arrest, imprisonment, and mistreatment of more than 200 demonstrators in Natchez. *Roberts v. Williams*,[34] had also been filed, asking damages for the blinding of a 14-year-old boy from a shotgun blast fired by an armed trusty in a county prison farm. Mississippi's Secretary of State had been sued to establish the right of a poverty organization to incorporate.[35] Other suits had been filed concerning discrimination in jury selection and in election practices, injustices in plantation owners' handling of federal subsidy payments due sharecroppers, and removals to federal court of harassing state court damage suits brought against civil rights boycotters.

The committee made efforts to patch up its differences with the Mississippi bar in the winter of 1967 – 68, but equilibrium was reached

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[31]LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, STATEMENT OF PURPOSE AND ACTIVITIES (1965).

[32]The facts and quotes in this paragraph are taken from the draft of an application by the Lawyers' Committee to the Ford Foundation, dated December 12, 1971.

[33]438 F.2d 183 (5th Cir. 1971), *modified on rehearing en banc*, 456 F.2d 835 (5th Cir. 1972).

[34]456 F.2d 819 (5th Cir. 1971).

[35]Smith v. Ladner, 288 F. Supp. 66 (S.D. Miss. 1968), held that MISS. CODE ANN. § 5310.1 (Supp. 1972) was unconstitutional and void because it allowed the Governor unlimited discretion to grant or refuse the issuance of charters for non-profit corporations.

only after the committee initiated and won a mandamus action in the Fifth Circuit challenging the restrictive practice order of the district court.[36] The decision effectively meant that out-of-state practitioners could represent clients in civil rights cases in Mississippi as a matter of right.

In the summers of 1964, 1965, and 1966, the emphasis of all three groups, supported by volunteer lawyers from outside the state and small staff offices, was to fight the steel-hard, inflexible, undeviating official policy of segregation.[37] With the exception of the Inc. Fund's school desegregation cases, the work of all three groups in the early years of the civil rights movement can be described as defensive in nature. Volunteers and staff lawyers alike were kept busy in "defense of civil actions and criminal prosecutions against Negroes and civil rights workers assertedly brought to harass and intimidate . . . [civil rights workers] on account of their involvement in civil rights."[38] In perspective, however, the work was not really defensive in effect; the lawyer's clients were actually very much on the offensive.

Prior to the Supreme Court's decision in *Greenwood v. Peacock*,[39] in cases where civil rights workers were charged with obstructing public streets, disturbing the peace, inciting to riot, and other related violations of the law, the usual procedure was to petition for removal to federal court, alleging that the arrest had the "sole purpose and effect of harassing petitioners and of punishing them and deterring them from exercise of their constitutionally protected right to protest the conditions of racial discrimination and segregation."[40] The Court's decision in *Peacock* eliminated the removal procedures as a means of defeating politically motivated criminal charges against civil rights workers. In proscribing the removal route, however, the Court was careful not to condone the abuse by southern authorities of the criminal judicial processes. The Court specifically pointed out that the aggrieved defendants had federal claims, but that "there are many other [constitutionally valid] remedies available. . . ."[41] The decision set the stage for a counterattack against

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[36]Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968). The rule permitted *pro hac vice* appearances by out-of-state lawyers in non-fee generating civil rights cases only (a) if the lawyer was an actual nonresident of the state (b) for one case in any 12-month period, and (c) if the lawyer had been admitted to the bar in his home state for 5 years.

[37]Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962).

[38]Plaintiff's post-trial brief in Sobol v. Perez, No. 67-243 (E.D. La., April 8, 1968).

[39]384 U.S. 808 (1966).

[40]*Id.* at 813.

[41]*Id.* at 827.

the various statutes and ordinances with which the civil rights workers were being harassed.

The early efforts of the Farish Street lawyers enabled the civil rights movement to accomplish its major objectives. The work also had a profound effect on the volunteers. They came face to face with a legal system in crisis. The issues were not obscure; the system was resisting change that was compelled in terms of judicially articulated rights. The volunteers also felt the effects of being outside the prevailing social system, which was a new experience for them. Many of them began to view problems of racial and economic discrimination in their own states in a new light and continued to participate in comparable litigation in their home communities.[42]

For those lawyers who remained in Mississippi, questions of strategy and ongoing purpose emerged. Although there was no clear line of demarcation, 1966 is generally regarded as being the first year of affirmative litigation. The Supreme Court's decision that year in *Peacock* had at least symbolic importance. In effect, LCCRUL and LCDC took that decision to task and began a concerted attack on the various statutes and ordinances under which the civil rights workers were being incarcerated. The following excerpt from an LCDC brief, written at the height of the civil rights movement, characterizes the work of both groups:

> They [LCDC dockets] include affirmative actions to desegregate schools, hospitals, municipal facilities and establishments covered by Title II of the Civil Rights Act of 1964; actions challenging employment discrimination under Title VII; injunctive actions to void unconstitutionally repressive statutes and ordinances that inhibit peaceful civil rights demonstrations and organizational activities; damage actions under the federal civil rights jurisdiction to redress and discourage police brutality against demonstrators; suits against racially discriminatory voting statutes and practices (including reapportionment cases) and against patterns and instances of racial discrimination in jury selection and other aspects of criminal law administration. They also include the organization and legal counseling of Negro voter registration groups, cooperatives and community action projects; and advising these groups on their rights and opportunities under such federal or mingled state and federal programs as the Agricultural Stabilization and Conservation Service, Veterans' Administration, Small Business Administra-

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[42]The Lawyers' Committee brokerage operation in urban centers is described in F. MARKS, *supra* note 7, ch. 5. The brokerage operation began with LCCRUL's Mississippi project in 1964-65.

tion, Social Security, Welfare, and Economic Opportunity Act.[43]

B. The OEO Legal Services Programs

The concern during the 1960's for the plight of the poor and racial minorities was not entirely without response in Mississippi. The year 1966 marked the beginning of the OEO-funded Legal Services Program in Mississippi. The impetus for this program came from within the state. The Economic Opportunity Act of 1964,[44] which created the Office of Economic Opportunity, did not include any provision for Legal Services. The program was born out of the realization that for the war on poverty to be effective, the legal rights of poor people as an identifiable group must be represented. In the fall of 1965, Legal Services was established as a semi-autonomous unit within the Office of Economic Opportunity. The program was to represent indigents in a full range of civil matters.[45] The purpose of the organization, however, went far beyond traditional legal aid. Legal Services was to be a social force as well as a service agency:

> [W]e cannot be content with the creation of systems rendering free legal assistance to all people who need but cannot afford the lawyer's advice. This program must contribute to the success of the War on Poverty. Our responsibility is to marshall the forces of law and the strength of lawyers to combat the causes and effects of poverty. Lawyers must uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty, and redesign new social, legal, and political tools and vehicles to move poor people from deprivation, depression, and despair to opportunity, hope and ambition. . . ."[46]

Legal Services announced the following as one of the purposes of the program:

> To ascertain what rules of law affecting the poor should be changed to benefit the poor and to achieve such changes either through the test case and appeal, statutory reform, or changes in the administrative process.[47]

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[43]Plaintiff's post-trial brief in Sobol v. Perez, Civil No. 67-243 (E.D. La., April 8, 1968) (three-judge court).

[44]Act of August 20, 1964, Pub. L. No. 88-452, 78 Stat. 508 *codified at* 42 U.S.C. §§ 2701 *et seq.* (1970).

[45]Stump, *Law and Poverty: A Political Perspective,* 1968 WIS. L. REV. 694, 696-97.

[46]1966 Address by E. Clinton Bamberger, Jr., to the National Conference of Bar Presidents, *as quoted in* Stump, *supra* note 45, at 711-12.

[47]Stump, *supra* note 45 at 697. *See also The Legal Services Corporation; Curtailing Political Interference,* 81 YALE L.J. 231 (1971).

By 1967, Legal Services was a national program employing over 1,800 lawyers in over 289 projects, including North Mississippi Rural Legal Services (NMRLS), which had been funded in April 1966, as a research and demonstration program at the University of Mississippi School of Law. Originally named Lafayette County Legal Services, NMRLS was conceived by its founders as a combination legal services and teaching program. The original director and his staff lawyers were members of the law faculty and worked part time in each capacity. Participation of law students was to be an integral part of the program. One of the original objectives was to infuse the law school curriculum with an emphasis on the legal problems of the poor.[48]

NMRLS was also originally intended as a judicare or referral type program. The bulk of the legal work was performed initially by local private practitioners working under a stipulated fee schedule.[49] The referral system, however, proved unsatisfactory both to OEO and to the client community.[50] As a result of the staff lawyers identifying with their clients' causes coupled with pressure from both client representatives and OEO, the NMRLS staff lawyers began to file class action suits affecting groups of poor people, as opposed to handling a service-type caseload only. This shift in emphasis caused political repercussions in the state which ultimately resulted in the termination of University sponsorship of the program.[51] In 1968, Mary Holmes College at West Point became the NMRLS grantee. The staff lawyers who elected to stay with the Legal Services Program were discharged from the faculty,[52] and the referral system involving local practitioners was gradually abandoned. The program became closely identified with the poverty-civil rights movement, and in the ensuing years was responsible for significant legal reform litigation.

Coahoma Legal Aid, Inc. (CLA) was also funded in 1966 as a single county program. Until this year the Clarksdale program was funded through the local Community Action Program agency, Coahoma Opportunities, Inc., but is now being funded directly from the Office of Legal Services in Washington. Coahoma began with members of the local bar staffing the office for a week at a time. Later, one staff attorney was employed; still later a second lawyer was added, so that for the past

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[48]The facts in this paragraph are taken from the narrative statement of the program contained in the original NMRLS proposal to OEO.

[49]*Id.*

[50]OEO Project Evaluation Report on Lafayette County Legal Services (Sept. 6, 1967).

[51]Egerton, *Shake up at Ole Miss*, Change, Winter 1972-73, at 24, 27.

[52]Trister v. University of Miss., 420 F.2d 499 (5th Cir. 1969).

several years CLA has been a two-lawyer office. CLA has primarily a service-type caseload, but it has done some significant law reform litigation, primarily in the area of juvenile rights.

Choctaw Legal Services was funded by OEO in 1967 as a part of the Choctaw Community Action Program. A one-lawyer office was established at Philadelphia to provide legal services for the approximately 4,000 members of the Mississippi Band of Choctaw Indians in central Mississippi. The program continued until 1972 when funding was terminated by OEO for a variety of reasons best known to that agency. In 1972 an effort was made to merge the Choctaw program with NMRLS, but when the proposed merger proved to be impractical the grant was terminated. The Choctaw program has now been reactivated with private funding.[53]

Jackson Hinds Community Legal Services (CLS), now incorporated as Community Legal Services of Mississippi, Inc., was funded by OEO-Office of Legal Services in March 1971. Although CLS was funded over the objections of the Mississippi State Bar and the Hinds County Bar Association, a number of private practitioners in Jackson have served on its board of directors. CLS had been in operation for almost a year through a grant from a private foundation before it was funded by OEO. It was thus an ongoing program at the time of its funding by OEO and was able to expand its caseload within a short period of time. During its few short years of existence, CLS has maintained an unusually large service-type caseload. Simultaneously, however, it has embarked upon a significant program of impact litigation, with a variety of cases attacking a wide range of discriminatory statutes and practices which perpetuate the cycle of poverty.

Both NMRLS and CLS have carried out their programs without approval of either the Mississippi State Bar or the local bar associations in the counties in which they operate. The CLS grant has been vetoed three times, once by Governor Williams, and twice by Governor Waller, NMRLS, on the other hand, has always been funded through an educational institution and is therefore not subject to the Governor's veto.[54]

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[53]Information on the new Choctaw Legal Services Program and its importance to the state is contained in an interesting series of articles on the Mississippi Band of Choctaw Indians written by a team of writters on the staff of the Memphis Commercial Appeal. *The Choctaws—Cheated, Abused and Ignored,* Memphis Commercial Appeal, March 18, 1973, at 15, col. 2; March 19, 1973, at 13, col 1; March 21, 1973, at 6, col. 1.

[54]42 U.S.C. § 2834 (1970).

The poverty legal services programs are in a category apart from the civil rights groups, insofar as impact litigation is concerned. Although their contribution in the area of law reform has been significant, the OEO-funded programs have always had an extremely heavy service-type caseload which the privately funded groups do not have. Because of the controversial nature of their more visible litigation, however, the poverty programs have been unfairly charged as having been constituted solely for the purpose of suing the establishment.

In reporting on Governor Williams' veto of the first OEO grant to CLS (after CLS had been in operation for a year under private funding) the *Mississippi Lawyer* said: "There is no legal service for the poor involved. Governor Williams said, 'The Grant is not intended to assist the poor with their legal problems.' "[55] This is not borne out by the facts. No poverty legal services program can operate without a heavy load of routine cases. Such is the nature of poverty itself. For example, during calendar year 1972, CLS opened 3,000 new cases. The breakdown on this enormous caseload, which is fairly typical for any of the Mississippi programs, is as follows:

Consumer (credit problems, truth in lending, debtor's relief, etc.)—21 percent.

Administrative (welfare, food stamps, social security, health services)—15 percent.

Housing—6 percent.

Family (divorce and separation, guardianships, adoptions)—29 percent.

Miscellaneous (mostly juvenile and youth court, habeas corpus, misdemeanors)—29 percent.

All OEO-funded Legal Services programs are required to have client representation on their governing bodies.[56] The Mississippi programs are no exception. Contrary to popular belief, this element of client input really works. It insures the responsiveness of the program to the clients' needs. Poor clients and their elected representatives consistently demand the acceptance and discharge of routine, noncontroversial, day-to-day legal and quasi-legal problems. Although their work has overlapped that of the privately funded civil rights groups, the emphasis of the federal programs has been more on economic discrimination, that is, on the discriminatory practices that tend to keep people in a perpetual

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[55] THE MISSISSIPPI LAWYER, May 1971.

[56] 42 U.S.C. § 2791 (b) (1970).

cycle of poverty.[57] The historical significance of the OEO programs, however, is the same as that of the civil rights groups; *i.e.,* for the first time in our state's history a substantial segment of our population has legal representation, not as individuals, dependent upon the largesse of the legal profession, but representation as a class, as a matter of right.

II. The Results to Date

The public-interest lawyers have been active in Mississippi for less than 10 years. What results have they achieved? One answer to the question is obvious: the most serious, the most emotional and hotly contested issues in Mississippi since 1860 have, for the most part, been resolved in the courts instead of in the streets. To the maximum extent of their limited resources, the public-interest groups are "making the system work for everyone,"[58] but the statement that they have helped our governmental processes to work as intended begs for a bill of particulars. One still is prompted to ask, "What has their work accomplished?" The best answer is a review of the cases.

A. School Desegregation

In assessing the value of employing the judicial process as a means of effecting social change, no group of cases can demonstrate such profound impact as those involving school desegregation. Harry Kalven, Jr., in commenting on the closely related first amendment problems arising out of what has been called the "counterattack of the South" against the NAACP, observed:

> One of the most distinctive features of the Negro revolution has been its almost military assault on the Constitution via the strategy of systematic litigation. In brief, by forcing its controversies into Court, it has accelerated mightily the evolving of legal doctrine defining Negro rights. Thus the first great step in the movement has been the effort to make the United States Supreme Court confront the Negro's constitutional claims and grievances and give the Negro his constitutional due. There has been much speculation in the philosophy of law about the sources of legal growth; here, however, the stimulus is clear. Here there has been no waiting for the random and mysterious process by which controversies are finally brought to the Court; there has been rather a marshaling of cases, a timing of litiga-

[57]Regulatory statutes which otherwise perform a useful and necessary function in society frequently discriminate against the poor. *See* the section on Property Rights and the 14th amendment, *infra.*

[58]The phrase is borrowed from the title of the Lawyers' Committee For Civil Rights Under Law, Annual Report, 1968.

> tion, a forced feeding of legal growth. This has been a brilliant use of democratic legal process, and its success has been deservedly spectacular. I am old-fashioned enough to read the development, not as political pressure on the Court which then as a political institution responded, but rather as a strategy to trap democracy in its own decencies. The Negro rights in an important sense were always there. What was needed was a strategy for bringing them to light. The agency responsible for this remarkable development and use of law has been the NAACP.[59]

A review of the reported decisions in *Singleton v. Jackson Municipal Separate School District*,[60] furnishes an overview of the successive stages of school desegregation in Mississippi: first, the rejection of defendants' contention that plaintiffs had failed to exhaust their administrative remedies,[61] followed by a preemptory rejection of defendants' attempts to overthrow *Brown*;[62] then the first order for a "good faith start" toward desegregation by the adoption of a gradual plan pending appeal;[63] then approval of a freedom of choice plan under HEW guidelines, including gradual desegregation by grades, with total desegregation to be completed by September 1967;[64] then rejection of "all deliberate speed" with an immediate order to begin the operation of a unitary system except for delayed merger of student bodies;[65] and finally the board's zoning plan held inadequate, with several specific steps ordered to correct deficiencies, including a majority to minority transfer rule with transportation provided, directions to the school board to find affirmatively a workable plan, and the appointment of a biracial committee to oversee the process and make reports to the court.[66]

School desegregation did not begin in Mississippi until 10 years after the Supreme Court decision in *Brown*.[67] Although the Court had

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[59]H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 66-67 (1966).

[60]*Singleton* was appealed so often the Court of Appeals numbered its decisions I, II, III, and IV. *See* notes 63-66 *infra*.

[61]Evers v. Jackson Mun. Sep. School Dist., 328 F.2d 408 (5th Cir. 1964) (later consolidated into *Singleton v. Jackson*).

[62]Jackson Mun. Sep. School Dist. v. Evers, 357 F.2d 653 (5th Cir. 1966), *cert. denied*, 384 U.S. 961 (1966).

[63]Singleton I, 348 F.2d 729 (5th Cir. 1965).

[64]Singleton II, 355 F.2d 865 (5th Cir. 1966).

[65]Singleton III, 419 F.2d 1211 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970).

[66]Singleton IV, 426 F.2d 1364 (5th Cir. 1970), *modified*, 430 F.2d 368 (5th Cir. 1970).

[67]In September 1964 three school districts were integrated: Biloxi (16 children), Carthage-Leake County (1 child), Jackson (39 children). A fourth district was ordered to integrate (Clarksdale) but no blacks entered the all-white schools. *See* SOUTHERN SCHOOL NEWS, October 1964, at 1, col. 2.

ordered an end to dual systems of public education and had seemingly placed the burden of compliance on individual school boards,[68] desegregation in Mississippi commenced under court orders that actually placed the burden of desegregation on the black parents and their children.[69] Under Mississippi's "freedom of choice plan," parents had to choose affirmatively, despite harassment and possible bodily harm, to send their children to public schools which always had been reserved for whites.

The year 1964 marked the entry of the federal government into the desegregation field. Under the Civil Rights Act of 1964,[70] the Justice Department was authorized to file civil suits to desegregate public schools, and federal agencies were authorized to withhold money from school districts that had not taken steps to end segregation.[71] Although by 1967 almost all school districts in Mississippi had qualified for federal funds,[72] the task of effective school desegregation had just begun. The efforts of the previous few years had definitely outlawed state-supported, racial segregation in public schools, but both the legal and social rationale in *Brown II*[73] called for much more:

> School desegregation cases involve more than a dispute between certain Negro children and certain schools. If Negroes are to ever enter in the mainstream of American life, as school children, they must have equal educational opportunities with white children.[74]

In order to achieve educational parity, the Supreme Court called for the elimination of dual school systems.

In *Green v. County School Board of New Kent County*,[75] the Supreme Court addressed itself to the constitutionality of "freedom of choice" plans which had the effect of transferring the burden of desegregation from school boards to black parents and their children. While the Court held that freedom of choice plans were not unconsti-

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[68]Brown v. Board of Educ. (*Brown II*), 349 U.S. 294 (1955).

[69]Evers v. Jackson Mun. Sep. School Dist., 328 F.2d 408 (5th Cir. 1964).

[70]42 U.S.C. § 1981 *et seq.* (1970).

[71]*Id.* § 2000c-6. General regulations implementing Title IV of the Act were published by HEW in December 1964 and April 1965.

[72]HEW report 1967, from SOUTHERN SCHOOL NEWS.

[73]In Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968), the Supreme Court reaffirmed its *Brown II* decision that dual school systems must be ended.

[74]United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 389 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967).

[75]391 U.S. 430 (1968).

tutional per se, the Court defined such plans as "only a means to a constitutionally required end."[76] The Court had formerly noted that opening previously "white" schools to black children did not resolve the constitutional mandate of *Brown II*,[77] and that where states had operated dual school systems, steps must be taken to "convert to a unitary system in which racial discrimination would be eliminated root and branch."[78] The Court called for "a plan that promises realistically to work now."[79] The Fifth Circuit had previously held that "the only school desegregation plan that meets constiutional standards is one that works."[80] The Supreme Court's ruling in *Green* served to make that holding both unequivocable and imperative.

At the time of the *Green* decision, most if not all of the school districts in Mississippi were more segregated than New Kent County.[81] In *Anthony v. Marshall County Board of Education*,[82] for example, the Court considered the acceptability of two freedom of choice plans. In one district only 21 out of 1,868 blacks were attending previously all-white schools. In the other district, 22 out of 3,606 blacks were attending integrated schools. This compared with the figures in *Green*, where the Court noted, that "85% of Negro children in the system still attend the all-Negro Walkins School. In other words, the school system remains a dual system."[83] The Fifth Circuit remanded the Marshall County case to the district court for the adoption of a more effective plan.

Green also cut through many of the peripheral factors which previously had obstructed the court's move toward more effective integration. The City of Clarksdale is bisected by railroad tracks. Traditionally, most of the blacks lived on the south side of the tracks. In *Henry v. Clarksdale School Board*,[84] the defendants had adopted a geographic zoning system that served to keep the school district segregated. Although the district court found that the school board had acted in "good faith" the Fifth Circuit, following *Green*, held that good faith was only relevant in an acceptable desegregation plan.[85] The Clarksdale case was remanded

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[76]*Id.* at 440.

[77]349 U.S. 294 (1955).

[78]391 U.S. at 438.

[79]*Id.* at 439.

[80]United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966).

[81]The statistics are set forth in tables in the court's opinion in United States v. Hinds County School Bd., 417 F.2d 852, 855-56 (5th Cir. 1969).

[82]409 F.2d 1287 (5th Cir. 1969).

[83]391 U.S. at 430.

[84]409 F.2d 682 (5th Cir. 1969).

[85]*Id.* at 685.

for the adoption of a plan that would actually accomplish the intended objective.

After the Court's decision in *Green*, the participants in the drama of school desegregation took on different roles. In previous years, the Justice Department had provided the representation for securing mandatory desegregation in some Mississippi school districts.[86] Their manpower had been important, if not decisive, in ending the pattern of forced segregation in Mississippi schools. But times had changed. First, the dearth of counsel that was evident in Mississippi in 1964 had altered slightly.[87] Second, the legal work required to attack the various desegregation plans which were not working called for a closer working relationship between black community leaders and their advocates. Following *Green*, Mississippi lawyers representing black parents and children attempted to intervene in a number of Justice Department desegregation suits.[88] When efforts to intervene were denied, a number of plenary school desegregation suits were filed. Hearings on the new suits were then incorporated into or consolidated with the pending cases so that intervention in effect was achieved.[89]

On October 29, 1969, the Supreme Court in deciding the Mississippi case *Alexander v. Holmes County Board of Education*,[90] stated:

> The question presented is one of paramount importance, involving as it does, the denial of fundamental rights to thousands of school children, who are presently attending Mississippi schools under segregated conditions contrary to applicable decisions of this Court . . . Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now hereafter only unitary schools.[91]

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[86]Between 1966 and 1968 the Justice Department filed approximately 40 desegregation suits in Mississippi.

[87]North Mississippi Rural Legal Services lawyers started handling school desegregation cases in its jurisdiction. The first such action was Anthony v. Marshall County School Bd., 409 F.2d 1287 (5th Cir. 1969).

[88]United States v. Montgomery County Bd. of Educ., WC 6720-K (N.D. Miss., filed June 7, 1967); United States v. Greenwood Mun. School Dist., GC 6640-K (N.D. Miss., filed Aug. 1, 1966); United States v. Carroll County Bd. of Educ., GC 6541-K (N.D. Miss., filed Aug. 5, 1966); United States v. Humphreys County School Dist., GC 6645-S (N.D. Miss., filed Aug. 15, 1966): Petitions to intervene were filed by North Mississippi Rural Legal Services lawyers on the ground that the rights of black children and their parents were being neglected.

[89]Subsequent appeals in United States v. Greenwood Mun. School Dist. were prosecuted by North Mississippi Rural Legal Services lawyers, 422 F.2d 1250 (5th Cir. 1970), 445 F.2d 388 (5th Cir. 1971), and 460 F.2d 1205 (5th Cir. 1972).

[90]396 U.S. 19 (1969).

[91]*Id.* at 20.

The Court also held that desegregation plans must be implemented prior to any further appeal.[92] Notably, in *Alexander* the Justice Department, for the first time in history, argued against the immediate implementation of desegregation plans.[93]

As the enforcement of the *Brown* decision in Mississippi slowly became an accomplished fact, the private school movement became inevitable. Counsel for the proponents of desegregation were then faced with the task of shutting off public tax support for these new private segregated academies. Two important decisions have proscribed the use of public funds for the support of the new schools founded to escape the impact of public school desegregation. A third case is still undecided.

First, in *Coffey v. State Educational Finance Committee*,[94] a three-judge federal district court struck down Mississippi's newly enacted tuition grant statute. The act had called for grants of $180 (later raised to $240) for each child who attended a private elementary or secondary school. In the first school year after the statute was enacted, two new nonsectarian private schools went into operation. Both were located in a district which was under court order to desegregate. As additional school districts were ordered desegregated, additional private schools were formed. Of the 49 regular private schools in which students received tuition grants during the 1967-68 school year, 48 had all white student populations.[95] The court noted that similar laws in five other states had been ruled unconstitutional.[96] On the basis of those cases and the Supreme Court decision in *Griffin v. School Board of Prince Edward County*,[97] the Mississippi statute was declared invalid.

The second decision was *Green v. Kennedy*,[98] a class action brought by Mississippi black parents and students in the Federal District Court for the District of Columbia to enjoin the Secretary of the Treasury and the Director of Internal Revenue from granting tax exempt status to private segregated schools in Mississippi. A preliminary injunction, subsequently made permanent, was issued enjoining the defendants from approving any pending or future application for tax exempt status under section 501 (c) (3) of the Internal Revenue Code of 1954 filed by any private school in Mississippi which enrolls students in grades 1 - 12 and from

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[92] *Id.* at 21.
[93] *Id.* at 19.
[94] 296 F. Supp. 1389 (S.D. Miss. 1969).
[95] *Id.* at 1391.
[96] *See id.* at 1390 n.1.
[97] 377 U.S. 218 (1964).
[98] 309 F. Supp. 1127 (D.D.C. 1970).

allowing contributions to any such schools to be deducted under section 170 (a) of the Code, unless they affirmatively determine, pursuant to directives and procedures satisfactory to the court, that the applicant school is not a part of a system of private schools operated on a racially segregated basis. In so holding the three-judge court in Washington relied heavily on the findings of fact made by the Court in *Coffey*.

The third case, *Norwood v. Harrison*,[99] presently on appeal to the Supreme Court, challenges the validity of a statute enacted in 1940, amended in 1942, which provides free textbooks to all school children in Mississippi.[100] In 1972, 34 thousand students received state-owned textbooks while attending the 107 all white nonsectarian private schools. Although the state textbook program has historically maintained a racially neutral policy in its administration, the question remains to what extent, if any, the state can provide financial assistance to white students who attend private schools in order to avoid desegregated public schools.

School desegregation litigation in Mississippi is not yet completed, but the focus has shifted. The issues now being contested involve, for the most part, busing of students; assignment of students to classes by performance on achievement tests; racial discrimination in the hiring, discharge, and placement of faculty and staff; and student disciplinary problems.[101]

B. Freedom of Speech and Assembly

During the early 1960's the civil rights groups were subjected to a number of harassing activities designed to impede their movements and thwart their objectives. Local officials would disrupt demonstrations by baseless arrests of demonstrators or their leaders. State court injunctions were also sought to halt marches and assemblies. Thus, in order for the civil rights movement to function at all in Mississippi, it was necessary for lawyers to attack the misapplication of a variety of statutes and ordinances and to seek federal judicial relief from state court injunctions. In so doing, lawyers and federal courts in numerous Mississippi cases have done much to protect citizens' fundamental rights to assemble, protest, speak, and petition governmental authority for the

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[99]340 F. Supp. 1003 (N.D. Miss. 1972), *prob. juris. noted,* 409 U.S. 839 (1972).

[100]Act of Feb. 16, 1940, ch. 202, [1940] Gen. Laws Miss. 368, as amended, MISS. CODE ANN. § 6634 *et seq.* (1952).

[101]Interviews with Louis Myers and Johnnie Walls, staff attorneys, NMRLS, Mar. 17 & 20, 1973.

redress of grievances. Whether directed to the legislature,[102] school boards, school administrators,[103] or business enterprises;[104] whether conducted by adults[105] or school children;[106] or whether with a specific object[107] or simply in spontaneous response to tragedy,[108] reasonable protest cannot be stifled either by the courts[109] or by legislative bodies.[110]

The decisions in Mississippi have helped define the limits of the right to assemble, protest and petition. For example, students may not picket a school board near school grounds during school hours.[111] Civil rights groups and their members cannot coerce or intimidate would-be customers of a store that is being boycotted.[112] The Supreme Court of Mississippi has found tort liability in one such case,[113] and the Fifth Circuit has refused to enjoin a similar state court proceeding before final judgment.[114]

The Mississippi cases have established no new legal principles; rather, old and settled law has been applied to Mississippi conditions to prevent governmental authority from permanently suppressing the lawful exercise of first amendment rights. The temporary suppression of such rights is another matter. Hopefully, the Mississippi decisions will serve a useful purpose in the future as both a guide and deterrent to local authorities who might be tempted to abuse the police power of the state by temporarily suppressing fundamental rights of free speech and assembly.

C. Enfranchising the Disenfranchised

Lawyers in Mississippi can take judicial notice that until recent enforcement of the stringent provisions of the Civil Rights Act of 1965,

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[102]Guyot v. Pierce, 372 F.2d 658 (5th Cir. 1967).

[103]Montgomery County Bd. of Educ. v. Shelton, 327 F. Supp. 811 (N.D. Miss. 1971).

[104]Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969), *rev'g in part,* 288 F. Supp. 295 (N.D. Miss. 1968).

[105]*Id.*

[106]Montgomery County Bd. of Educ. v. Shelton, 327 F. Supp. 811 (N.D. Miss. 1971).

[107]Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969) (boycott of business).

[108]Robinson v. Coopwood, 292 F. Supp. 926 (N.D. Miss. 1968), *aff'd per curiam,* 415 F.2d 1377 (5th Cir. 1969) (assassination of Dr. Martin Luther King).

[109]*E.g.,* Montgomery County Bd. of Educ. v. Shelton, 327 F. Supp. 811 (N.D. Miss. 1971).

[110]*E.g.,* Robinson v. Coopwood, 292 F. Supp. 926 (N.D. Miss. 1968).

[111]Montgomery County Bd. of Educ. v. Shelton, 327 F. Supp. 811 (N.D. Miss. 1971).

[112]Henry v. First Nat'l Bank, 444 F.2d 1300 (5th Cir. 1971), *rev'g* 50 F.R.D. 251 (N.D. Miss. 1970).

[113]Southern Christian Leadership Conference v. A.G. Corp., 241 So. 2d. 619 (Miss. 1970).

[114]Henry v. First Nat'l Bank, 444 F.2d 1300 (5th Cir. 1971).

black citizens in Mississippi were deliberately denied the right to vote. No citation of authority is necessary, although the facts have been adequately documented in a number of federal cases.[115] The registration statistics speak for themselves. In Panola County, for example, in October 1961, only one black person was registered to vote.[116] And in Walthall County, in August 1961, although there were 2,490 black people of voting age in the county, no blacks were registered to vote.[117] In Amite County, at the time an omnibus suit was filed by the Justice Department against the State of Mississippi, only one out of 2,560 black people of voting age was registered.[118] The statewide figures are not much better. In 1954 only about 4.4 percent of blacks of voting age in Mississippi were registered.[119]

The methods employed by Mississippi whites to keep black people from voting have been as ingenious and persistent as the mind of man could possibly imagine. The various constitutional provisions, statutes, and customs have been adequately described in other articles and need not be repeated here, except to note that the objective was effectively accomplished through a sophisticated combination of devices: all white primaries,[120] re-registration,[121] understanding and interpretation tests,[122] an application form test,[123] a citizenship test,[124] ad hoc rules of local registrars,[125] and a literacy requirement.[126]

A succession of federal statutes — the Civil Rights Acts of 1957, 1960, and 1964 — had only a limited impact in securing the right to vote for black citizens in Mississippi.[127]

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[115]United States v. Duke, 332 F.2d 759 (5th Cir. 1964); United States v. Mississippi, 229 F. Supp. 925 (S.D. Miss. 1964). An excellent history of the racial discrimination process in Mississippi's voting procedure is contained in Note, *Federal Protection of Negro Voting Rights,* 51 VA. L. REV. 1052, 1079-91 (1965).

[116]332 F.2d 759 (5th Cir. 1964).

[117]229 F. Supp. 925 (S.D. Miss. 1964).

[118]United States v. Mississippi, 380 U.S. 128 (1965).

[119]*Id.*

[120]Invalidated in Smith v. Allwright, 321 U.S. 649 (1944). In 1947 the legislature sought to accomplish the same results by enacting a statute requiring voters in a primary to be in accord with the principles of the party holding the primary. Act of March 15, 1947, ch. 17, [1947] Gen. Laws Miss. 904.

[121]Note, *Federal Protection of Negro Voting Rights, supra* note 115, at 1079.

[122]*Id.* at 1084.

[123]*Id.* at 1087.

[124]*Id.* at 1088.

[125]*Id.* at 1090.

[126]*Id.* at 1091.

[127]McCarty & Stevenson, *The Voting Rights Act of 1965: An Evaluation,* 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 357, 358-59 (1968). *See also* Derfner, *Multi-Member Districts and Black Voters,* 2 BLACK L.J. 120 (1970).

> Despite the earnest efforts of the Justice Department, and of many federal judges, these new laws have done little to cure the problem of voting discrimination. According to estimates by the attorney general during hearings on the act, registration of voting age Negroes . . . in Mississippi . . . increased only from 4.4% to 6.4% between 1954 and 1964.[128]

Before the pre-1965 voting rights acts could be used effectively, "[t]hey had to undergo a trial by judicial ordeal in the Fifth Circuit and the District Courts of that Circuit."[129] A total of 71 suits were filed under the provisions of these statutes.[130]

If the cases on school desegregation illustrate the effectiveness of litigation as a means of effecting social change, the voting rights cases under the pre-1965 civil rights acts illustrate the limitations of using the judicial process to accomplish that purpose. The right to vote is so fundamental, and the importance of the ballot as a weapon to force needed change so obvious, one must wonder why so little was accomplished in this area by the earlier statutes and the decisions construing them. Undoubtedly there is no single reason. A variety of factors combined to make progress slow and tedious, *inter alia*: the absence of any presumptions in favor of the government or disenfranchised blacks,[131] the difficulty of locating and colating records,[132] unsympathetic federal district courts in the Fifth Circuit (with some exceptions),[133] and the ingenuity of state officials in devising new discriminatory procedures when existing ones were declared void.[134]

In *South Carolina v. Katzenbach*,[135] the Court said:

> The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing

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[128]South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966).

[129]Note, *Federal Protection of Negro Voting Rights, supra* note 115, at 1100.

[130]Derfner, *supra* note 127.

[131]Note, *Federal Protection of Negro Voting Rights, supra* note 115, at 1100.

[132]*Id.* at 1101.

[133]*Id.*

[134]*Id.* at 1082.

[135]383 U.S. 301 (1966).

> disparity between white and negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls. The provision of the 1960 law authorizing registration by federal officers has had little impact on local maladministration because of its procedural complexities.[136]

The Court's explanation of the ineffectiveness of both the pre-1965 statutes and the lawsuits brought to enforce them, however, does not provide a complete explanation of the lack of progress. In addition to the reasons cited by the courts and the writers of various law review articles on the subject, apparently less attention was given to voting rights litigation by civil rights lawyers during the early days of the civil rights movement. Or to express it from the standpoint of the client groups, civil rights organizations apparently elected to leave the task of enforcing voting rights to the federal government,[137] rather than pursuing a vigorous program of litigation on their own.

In any event, the history of voting rights law reform, except for the 14th amendment cases, is essentially legislative, not judicial. Recent cases have given the statutes a broad interpretation and application, but federal legislation was the force that finally burst the dam of systematic disenfranchisement of blacks in the deep South. The civil rights groups were undoubtedly the force behind this legislation. By putting pressure on both the Justice Department and the Congress these groups secured the enactment of the increasingly stringent legislation.

The 1965 act was a response to: (1) the frustration experienced by the Justice Department lawyers in their attempts to enforce earlier statutes; (2) the creativity of Southern officials in designing new ways to discriminate; and (3) to the difficulties experienced by Justice Department lawyers in the federal district courts in the Fifth Circuit.[138] The new Act attacked the problem of systematic disenfranchisement in the applicable Southern states with a variety of sweeping and stringent provisions. Registration provisions in the affected states were automatically whisked away.[139] The burden of proof was shifted from the federal government to the states: the states had to show that there was no discrimination. With the existing state registration requirements eliminated, no new voting requirements could be adopted until they had been submitted to either the Attorney General of the United States or to

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[136] *Id.* at 314.

[137] The 71 suits described by Derfner, *supra* note 127, were all filed by the Justice Department.

[138] Derfner, *supra* note 127. *See generally* Note, *Federal Protection of Negro Voting Rights, supra* note 115, at 1195.

[139] 42 U.S.C. § 1973 (b) (1970).

the United States District Court for the District of Columbia for a determination of whether the enactment would discriminate against racial minorities.[140] The Act also provided for the appointment of federal examiners who were directed to register people who had been denied registration in the past.[141] The appointment of federal observers to attend polling places to determine whether eligible voters were being permitted to vote and to ensure that votes were being counted properly was also authorized.[142] Private action to intimidate voters was prohibited with both criminal sanctions and civil remedies for violations.[143]

Following the passage of the Voting Rights Act of 1965, civil rights lawyers in Mississippi began to enforce its provisions through litigation on behalf of private individuals. Under the title of *Allen v. State Board of Elections,*[144] one Virginia case and three Mississippi cases went before the Supreme Court to determine if changes in state election laws came within the purview of section 5 of the Act. *Fairley v. Patterson* involved a 1966 amendment to section 2870 of the Mississippi Code which authorized the board of supervisors of each county to change from beat or district elections to at-large elections. *Bunton v. Patterson* concerned a 1966 amendment to section 6271-08 of the Mississippi Code, which provided that in 11 specified counties the county superintendent of education should be appointed by the board of education. Prior to this amendment the counties in question had the option of electing or appointing the superintendent of education. *Whitley v. Williams* challenged a 1966 amendment to section 3260 of the Mississippi Code which altered the requirements for independent candidates running in general elections. The amendment made four revisions, all of which were designed to complicate the entry of independent candidates in general elections.

In all three cases, a three-judge district court ruled that the amendments to the Mississippi Code did not come within the purview of and were not covered by section 5 of the 1965 act.[145] The plaintiffs brought

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[140]*Id.* § 1973 (c).

[141]*Id.* § 1973 (d) (e).

[142]*Id.* § 1973 (f).

[143]*Id.* § 1973 (j).

[144]393 U.S. 544, 552 (1969). This case involved the consolidation of several cases on direct appeal from district courts. The Mississippi cases were Fairley v. Patterson, 282 F. Supp. 164 (S.D. Miss. 1967); Bunton v. Patterson, 281 F. Supp. 918 (S.D. Miss. 1967); and Whitley v. Johnson, 260 F. Supp. 630 (S.D. Miss. 1966).

[145]Fairley v. Patterson, 282 F. Supp. 164 (S.D. Miss. 1967); Bunton v. Patterson, 281 F. Supp. 918 (S.D. Miss. 1967); Whitley v. Johnson, 260 F. Supp. 630 (S.D. Miss. 1966).

direct appeals to the Supreme Court, which held that the statutory amendments in all three Mississippi cases did come within the purview of section 5 and would have to be subjected to federal scrutiny before they could be enforced. The Court refused, however, to order new elections under the pre-amendment laws. The Court gave only prospective effect to its decision, and the Mississippi cases were reversed and remanded to the district court with instructions to issue injunctions restraining the further enforcement of the enactments until such time as the states adequately demonstrated compliance with section 5. When the state finally submitted the amendments to the Attorney General for approval, all of the proposed changes were denied.

The decision in *Allen* was important for a number of reasons. It established a broad interpretation of the federal scrutiny requirements of section 5. Mississippi was put on notice that all changes in election procedures would have to be examined by federal authorities. Although the results cannot be documented, attorneys for the plaintiffs in the three Mississippi cases consolidated in *Allen* are convinced that the decision has served as a strong deterrent to the enactment of new discriminatory legislation. *Fairley* was important because it helped stop the movement toward at-large elections in Mississippi. The decision in *Bunton* has foreclosed the appointment of superintendents of education in counties where the election of a black superintendent is a possibility. The decision in *Whitley* also had an important effect, since a number of blacks in Mississippi have gained public office by running as independents.

In *Perkins v. Matthews*,[146] voters and candidates instituted an action in the United States District Court for the Southern District of Mississippi to enjoin the 1969 city elections in Canton on the ground that the city sought to enforce certain changes in voting procedures which had not been first submitted for federal approval under section 5. The changes were: (1) in locations of polling places, (2) in municipal boundaries through annexations of adjacent areas which enlarged the numbers of eligible voters, and (3) from ward to at-large election of aldermen. A three-judge district court dismissed the complaint on the ground that the challenged changes did not have a discriminatory purpose or effect.[147] The elections were held with the changes in effect.[148] On direct appeal, the Supreme Court held that the district court should have limited its inquiry to a determination of whether the changes, without regard to their effect, were covered by section 5 and therefore must be submitted

[146]400 U.S. 379 (1971).

[147]Perkins v. Matthews, 301 F. Supp. 565 (S.D. Miss. 1969).

[148]*Id.*

for Federal approval. The Court further held that any change in election procedures, no matter how small, was subject to section 5 scrutiny, thus changes in location of polling places, annexations, and changes to at-large elections were all covered. Once again, however, the Court refused to order new elections and remanded the case to the district court for initial determination of an appropriate remedy.

In *Perkins* the plaintiffs won the battle, but lost the war — at least so far. On remand the district Court ordered new elections only for two alderman posts. The changes in location of polling places and the annexations were held not to have affected the outcome of the other elections. Moreover, because of the delay the defendants were able to submit the changes to the Attorney General for approval; the approval was secured, and the new elections were held at large. No blacks bothered to qualify because they knew they could not win.[149] The approval of the Attorney General, however, is presently being challenged in the Federal District Court for the District of Columbia.

Evers v. State Board of Election Commissioners[150] was a class action suit for declaratory and injunctive relief against the enforcement of Mississippi's "open primary" law enacted in 1970. The State of Mississippi submitted the new legislation to the United States Attorney General under section 5, but he refused to rule on the question, taking the position that he did not have time to make a decision on the discriminatory impact of the new legislation within the requisite length of time; that in view of the circumstances the Attorney General would neither approve nor disapprove of the legislation and suggested that any person "interested in or aggrieved by this legislation has an available opportunity to seek judicial relief." A three-judge district court held that the legislation in question had not been subject to the requisite federal scrutiny under section 5, and an injunction was issued against the defendants restraining any enforcement of the new legislation. Thus, the general elections then pending were required to be held and conducted under state laws which were in force on November 1, 1964.[151] A direct appeal by the state was dismissed for failure to docket the case within the time prescribed by Rule 13 (1) of the Court.[152] The effect of this litigation was to leave the open primary law "in a state of suspended animation."[153]

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[149]Interview with George P. Taylor former chief counsel, LCCRUL, Jackson, Miss., March 21, 1973.

[150]327 F. Supp. 640 (S.D. Miss. 1971), *appeal dismissed,* 405 U.S. 1001 (1972).

[151]*Id.*

[152]405 U.S. 1001 (1972).

[153]327 F. Supp. 640, 644 (S.D. Miss. 1971).

Evers had ramifications over and beyond blocking the enforcement of the open primary law. The refusal of the Attorney General to rule on the state's request for approval caused repercussions which ultimately resulted in the promulgation of new and better procedures in the Attorney General's office for responding to submissions under section 5.[154]

Not all of the voting rights cases in Mississippi have been based on congressional legislation. Indeed, as Derfner asserts, "the single most useful protection against voting discrimination today is the Equal Protection Clause of the Fourteenth Amendment."[155] The equal protection clause was the basis for invalidating Mississippi's durational residency requirements for both voting and registration.

Ferguson v. Williams[156] was precipitated by the ratification of the 26th amendment, which took place in Mississippi at a time when 18- to 20-year-old voters were unable to comply with Mississippi's 4-month registration requirement in time to vote in the upcoming general election. The suit challenged the 4-month registration requirement on the ground that it was violative of the equal protection clause of the 14th amendment. A three-judge district court applying the rational relation standard for equal protection review held that the 4-month registration deadline did not violate the equal protection clause.[157] On direct appeal, the Supreme Court reversed in a memorandum decision[158] ordering the district court to reconsider the case in the light of the Court's decision in *Dunn v. Blumstein*,[159] which held Tennessee's durational residency requirement for voting unconstitutional. In *Dunn*, the Court held that a durational residency requirement is valid only where "necessary to promote a compelling state interest."[160] On remand, the district court applied the compelling state interest test, holding that the 4-month residency requirement was unreasonable and that a period of 30 days would meet the constitutional test.[161]

A case brought shortly after *Ferguson* was *Graham v. Waller*,[162] which invalidated, also under the equal protection clause, the state's constitutional and statutory requirement that to be a qualified elector, a person must reside 1 year in the state, 1 year in the county, and 6 months

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[154]Interview with Frank Parker, Lawyers Committee for Civil Rights Under Law, Jackson, Miss., March 23, 1973.

[155]Derfner, *supra* note 127.

[156]343 F. Supp. 654 (N.D. Miss. 1972).

[157]330 F. Supp. 1012 (N.D. Miss. 1971).

[158]405 U.S. 1036 (1972).

[159]405 U.S. 330 (1972).

[160]405 U.S. at 337.

[161]Ferguson v. Williams, 343 F. Supp. 654 (N.D. Miss. 1972).

[162]343 F. Supp. 1 (S.D. Miss. 1972).

in the precinct or municipality. Following the *Dunn* rationale, the district court found that a 30-day residency requirement in the state, county, and precinct or municipality satisfied the compelling state interest for establishing bona fide residence for voting. In *Ferguson,* which on remand was decided after *Graham,* it was noted that the 30-day residency requirement for voting does not have to be satisfied before one may register to vote "for any person otherwise qualified may at any time register if he shall meet the residency requirement by the date of the election, although he may not do so at the date of registration."[163]

As important as registration is for minority groups, the question of concentration versus dilution of their vote is equally important. When in the minority within a given jurisdiction, the blacks' ability to participate effectively in the decision-making process depends entirely upon their ability to keep their votes from being diluted. The problem of county redistricting is considered in the article by Frank Parker elsewhere in this issue. Legislative and congressional reapportionment has been, and still is, the subject of a career lawsuit for a number of civil rights lawyers in Mississippi under the style of *Conner v. Johnson.*[164] The case has resulted in court-ordered legislative reapportionment plans for both the 1967 and 1971 elections, and the struggle still continues.

In the first installment of *Conner,* filed in October 1965, a three-judge district court held that the then-existing apportionment of both houses of the Mississippi Legislature was violative of the equal protection clause of the 14th amendment, and that the seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis.[165] The court declared the applicable sections of the Mississippi constitution[166] and the Mississippi Code[167] to be unconstitutional and invalid for all future state legislative elections. The court took the position, however, that legislative reapportionment is primarily the responsibility of the legislature and that the court should not interfere with that process unless absolutely necessary. The court therefore directed the Mississippi Legislature to reapportion itself before December 1, 1966, but retained jurisdiction in the event that a constitutional

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[163]Ferguson v. Williams, 343 F. Supp. 654, 657 (N.D. Miss. 1972).

[164]256 F. Supp. 962 (1966), *modified,* 265 F. Supp. 492 (1967), *decision on another issue,* 279 F. Supp. 619 (1966) (Congressional reapportionment), *aff'd mem.,* 386 U.S. 483 (1967). The district court retained jurisdiction to determine validity of the 1971 reapportionment plan. 330 F. Supp. 506 (1971), *stay entered,* 402 U.S. 690 (1971), *judgment vacated,* 404 U.S. 549 (1971), *on remand,* 330 F. Supp. 521 (1971).

[165]256 F. Supp. 962 (1966).

[166]Miss. Const. art. 13, §§ 254-55.

[167]Miss. Code Ann. §§ 3326-27 (1956) (which have since been amended).

reapportionment plan was not adopted by the legislature within the specified time limit.

The next installment of *Conner* transpired after a special session of the legislature had adopted a new reapportionment plan to meet the court's December 1, 1966 deadline. After examining the legislature's reapportionment plan in light of *Swann v. Adams*,[168] the court found the plan unconstitutional on its face. The court then entered its own plan for the reapportionment of the Mississippi Legislature,[169] and the 1967 elections were held in accordance with the court-ordered plan.

In their original bill of complaint the plaintiffs in *Conner* had also sued for congressional reapportionment of Mississippi under the Supreme Court's one-man, one-vote rule, but the hearing on the issue of congressional redistricting was delayed until September 1966. Between the original filing of the complaint and the date of the hearing, the legislature provided for reapportionment of the five congressioial districts.[170] The plaintiffs contended that although the new congressional redistricting plan divided the state into substantially equal districts from the standpoint of population alone, the district lines actually had been gerrymandered in such a manner as to make it impossible for a black congressman in Mississippi to be elected for at least 10 years. Plaintiffs' objections were overruled by the court, and the congressional redistricting plan adopted by the legislature was approved.[171] On direct appeal, the congressional reapportionment portion of *Conner* was affirmed by the Supreme Court in a memorandum decision.[172]

Conner emerged again in May 1971, after the Mississippi Legislature had again attempted to reapportion itself, this time following the 1970 census. In its regular 1971 session, the legislature adopted a new reapportionment plan for use in the quadrennial elections of 1971.[173] Once again, however, the legislature failed to comply with the one-man, one-vote rule. The court found that in the senate alone the variances from the norm ranged from 11.60 percent underrepresentation to 14.26 percent overrepresentation, and again drafted and ordered its own reapportionment plan. In so doing, however, the court sanctioned the dilution of black votes by refusing to order the redistricting of multimember districts. The court noted that for the three single-county districts with four or more representatives, single-member districting plans

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[168]385 U.S. 440 (1967).

[169]265 F. Supp. 492 (1967).

[170]Act of April 7, 1966, ch. 616, [1966] Gen. Laws Miss. 1251.

[171]279 F. Supp. 619 (1966).

[172]386 U.S. 483 (1967).

[173]Act of Mar. 23, 1971, ch. 394, [1971] Gen. Laws Miss. 407.

would be preferable, but held that it did not have sufficient time to appoint a special master to take testimony and to make findings as to whether the more populous counties might be divided into districts of substantially equal population in time for the 1971 elections.[174] Plaintiffs applied for and secured a stay by the United States Supreme Court for the portion of the order refusing to redistrict Hinds County.[175] The Court instructed the district court, absent insurmountable difficulties, to devise and put into effect a single-member district plan for Hinds County by June 14, 1971. On remand of the stay order, however, the district court found "insurmountable difficulties."[176] The 1971 elections for members of the legislature in Hinds County were held at-large. On appeal on the merits *sub. nom. Conner v. Williams*,[177] the Supreme Court vacated the judgment and remanded the case for further proceedings. The Court refused, however, to invalidate the 1971 elections even though it found that the district court's plan "does not precisely square with Fourteenth Amendment requirements."[178] In its opinion the Court noted the announced intention of the district court to appoint a special master to accomplish the redistricting of Hinds, Harrison, and Jackson Counties, and the Court encouraged the prompt completion of the redistricting of those counties. On remand, however, the district court delayed taking any action until January 1973, when the plaintiffs filed a motion for the appointment of a special master to develop a plan for redistricting the multi-member districts, whereupon an order was entered by the court deferring action on the motion until the legislature had a chance to act. In February, the legislature adopted a plan substantially similar to the one ordered by the district court in 1971,[179] in spite of the finding by the Supreme Court that it did not meet constitutional standards. The plaintiffs thereupon filed objections to the legislature's new plan,[180] and the litigation promises to continue for another 8 years.

D. Administration of Justice

1. Racial Discrimination in Jury Selection

Since Mississippi jury venires traditionally have been drawn from voter

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[174]330 F. Supp. 506 (1971).

[175]402 U.S. 690 (1971).

[176]330 F. Supp. 521 (1971).

[177]404 U.S. 549 (1972).

[178]*Id.* at 550.

[179]Conner v. Johnson, 330 F. Supp. 506 (1971). *See* H.B. 1389, Miss. Legis., 1973 Sess.

[180]Interview with Frank R. Parker, Lawyers Committee for Civil Rights Under Law, Jackson, Miss., March 23, 1973.

registration rolls,[181] one of the unhappy corollaries of minority disenfranchisement from the political process has been their exclusion from the judicial process as well. Prior to the mid-1960's, blacks participated in Mississippi's criminal judicial process only as defendants, if that may be called participation. Due in part to the segregation of both of the state's law schools, there were only three black lawyers and no black judges. There were no black law enforcement officers, no black correctional personnel, no black judicial personnel, and no black jurors.[182] There were only black defendants.

The Mississippi Supreme Court found in 1965 that "[s]ince 1880 it has been settled law that systematic and discriminatory exclusion of Negroes from jury service violates the fourteenth amendment of the United States Constitution."[183] Yet, the "settled law" recognized in *Harper v. State*,[184] had not, prior to 1965, begun to settle in Mississippi. Since systematic exclusion recently has been held to violate the rights of white as well as black defendants,[185] the thought that for over 90 years the criminal courts of Mississippi have been "tribunals that fail to satisfy the elementary requirements of due process, and neither [their] indictment[s] nor conviction[s] can stand"[186] is a sobering one. The right of minority defendants to non-exclusionary grand and petit juries was, with extremely rare exceptions,[187] simply not asserted by white defense attorneys in Mississippi. The decision by the United States Supreme

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[181]MISS. CODE ANN. § 1766 (Supp. 1973), provides that supervisors can use voter registration rolls as a "guide" in drawing jury venires.

[182]*See* Patton v. Mississippi, 332 U.S. 463, 469 (1947); United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959).

[183]Harper v. State, 251 Miss. 699, 706, 171 So. 2d 129, 132 (1965). *See also* 18 U.S.C. § 243 (1970) (originally enacted as Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 336), making it a crime to "exclude or fail to summon" a qualified citizen for jury duty on account of his race.

[184]251 Miss. 699, 171 So. 2d 129 (1965).

[185]Peters v. Kiff, 40 U.S.L.W. 4819 (U.S. June 22, 1972).

[186]*Id.* at 4823.

[187]United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959) in which a black lawyer from Chicago took over the case on appeal after the local white lawyer employed by the defendant's family had failed to raise the jury issue at trial and had failed to advise his client of the right to do so; Gordon v. State, 243 Miss. 750, 140 So. 2d 88 (1962), in which a white lawyer was successful in asserting jury exclusion in this appeal, but subsequently, on remand, failed to raise the issue in the second trial. A black lawyer, one of Mississippi's first, took over on appeal and successfully asserted jury exclusion in Gordon v. Breazeale, 246 F. Supp. 2 (N.D. Miss. 1965); Seay v. State, 212 Miss. 712, 55 So. 2d 430 (1951); Patton v. State, 207 Miss. 120, 40 So. 2d 592 (1949); McGee v. State, 203 Miss. 592, 33 So. 2d 843 (1948); Farrow v. State, 91 Miss. 509, 45 So. 619 (1908).

Court in a 1947 Mississippi case (argued by Thurgood Marshall) seemed to be almost without effect in Mississippi, in spite of its very clear language:

> When a jury selection plan, whatever it is, operates in such a way as always to result in the consistent and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them . . . cannot stand.[188]

This ethical blot on the organized bar was so well-known as to be judicially noticed by the Fifth Circuit in 1959:

> As Judges of a Circuit comprising six states of the deep South, we think that it is our duty to take judicial notice that lawyers residing in many Southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries.[189]

And, as recently as 1972, the same court noted "That white lawyers representing black clients often fail to raise an objection to jury composition has been recognized as a problem in this Circuit."[190]

Thus, it was not until the mid-1960's, when the first native Mississippi black lawyers appeared and white public-interest lawyers came from other states to live and practice here, that the "settled law" of *Harper* came to be applied in behalf of black Mississippians. The process was a long and arduous one[191] as reflected by the following statement of the

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[188]Patton v. Mississippi, 332 U.S. 463, 469 (1947).

[189]United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71, 82 (5th Cir. 1959). *See generally* Kuhn, *Jury Discrimination: The Next Phase,* 41 So. CAL. L. REV. 235 (1968); Note, *Negro Defendants and Southern Lawyers: Review in Federal Habeas Corpus of Systematic Exclusion of Negroes From Juries,* 72 YALE L.J. 559 (1963).

[190]Winters v. Cook, 466 F.2d 1393, 1396 (5th Cir. 1972). For some of the underlying rationale, *see* Windom v. Cook, 423 F.2d 721 (5th Cir. 1970); Whitus v. Balkcom, 333 F.2d 496 (5th Cir. 1964); Cobb v. Balkcom, 339 F.2d 95 (5th Cir. 1964); United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959), *cert. denied,* 361 U.S. 850 (1959); Colson v. Smith, 315 F. Supp. 179 (S.D. Ga. 1970), *aff'd,* 438 F.2d 1075 (5th Cir. 1971).

[191]Winters v. Cook, 466 F.2d 1393 (5th Cir. 1972) (pending rehearing en banc); Ford v. White, 430 F.2d 951 (5th Cir. 1970); Windom v. Cook, 423 F.2d 721 (5th Cir. 1970); United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959), *cert. denied,* 361 U.S. 850 (1959); Willis v. Carson, 324 F. Supp. 1144 (S.D. Miss. 1971); Goode v. Cook, 319 F. Supp. 246 (S.D. Miss. 1969); Love v. McGee, 297 F. Supp. 1314 (S.D. Miss. 1968); Ellzey v. Breazeale, 277 F. Supp. 948 (S.D. Miss. 1967); Gordon v. Breazeale, 246 F. Supp. 2 (N.D. Miss. 1965); Smith v. Breazeale, 245 F. Supp. 978 (N.D. Miss. 1965); Caston v. State, 240 So. 2d 443 (Miss. 1970); Spencer v. State, 240 So. 2d 260 (Miss. 1970); Smith v. State, 229 So. 2d 551 (Miss. 1969); Ford

Mississippi Supreme Court in a 1967 decision:

> The time has long since passed that this Court should be confronted with a case where a defendant can successfully rely on a long-continued omission of Negroes from jury service to establish a prima facie case of discrimination. We have heretofore pointed out that county officials must see to it that jurors are in fact and in good faith selected without regard to race.[192]

Waiver by guilty plea of racial discrimination in the jury selection process is today the most important question in the field of post-conviction remedies in Mississippi. In *Winters v. Cook*,[193] a 17-year-old black male had been charged with the murder of a white man. The defendant was represented by admittedly competent counsel, a white lawyer experienced in criminal trial practice and familiar with the available defense of racial discrimination in the selection of both grand and petit juries. As a matter of strategy, counsel deemed a guilty plea to be in his client's best interest. On advice of counsel, the defendant pleaded guilty and was sentenced to life imprisonment. Counsel testified that he used the racial exclusion defense in his plea bargaining with the prosecution, but he did not advise the defendant himself of the availability of that defense. The Supreme Court of Mississippi held that "[t]he petitioner's voluntary guilty plea waived all non-jurisdictional defects."[194] On petition for habeas corpus, however, the Fifth Circuit found that the defendant could not be held to a waiver of his right to object to systematic exclusion of blacks from both grand and petit juries. The court of appeals considered but rejected the argument that counsel's knowledge of the defense, coupled with his deliberate tactical decision to opt for a guilty plea instead, constituted a waiver. The court said, "The rationale

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v. State, 227 So. 2d 454 (Miss. 1969); Alexander v. State, 226 So. 2d 905 (Miss. 1969); Williams v. State, 220 So. 2d 325 (Miss. 1969); King v. State, 210 So. 2d 887 (Miss. 1968); Williams v. State, 210 So. 2d 780 (Miss. 1968); Chin v. State, 210 So. 2d 666 (Miss. 1968); Morris v. State, 206 So. 2d 832 (Miss. 1968); Harris v. State, 206 So. 2d 829 (Miss. 1968); Whitney v. State, 205 So. 2d 284 (Miss. 1967); Davis v. State, 204 So. 2d 270 (Miss. 1967); Boyd v. State, 204 So. 2d 165 (Miss. 1967); Shields v. State, 203 So. 2d 78 (Miss. 1967); Reed v. State, 199 So. 2d 803 (Miss. 1967); Fondren v. State, 199 So. 2d 625 (Miss. 1967); Shinall v. State, 199 So. 2d 251 (Miss. 1967); Watts v. State, 196 So. 2d 79 (Miss. 1967); Shinall v. State, 187 So. 2d 840 (Miss. 1966); Black v. State, 187 So. 2d 815 (Miss. 1966); Bass v. State, 254 Miss. 723, 182 So. 2d 591 (1966); Hopkins v. State, 254 Miss. 484, 182 So. 2d 236 (1966); Harper v. State, 251 Miss. 699, 171 So. 2d 129 (1965).

[192]Fondren v. State, 199 So. 2d 625, 627 (Miss. 1967).

[193]466 F.2d 1393 (5th Cir. 1972) (rehearing en banc pending), *noted in* 44 Miss. L.J. 293 (1973).

[194]Winters v. State, 244 So. 2d 1, 2 (Miss. 1971).

for such view is that Winters' lawyer knew of the right and that by failing to raise the objection counsel effectively waived the right for Winters. But it is axiomatic that Winters is the one who must make the waiver, not his attorney."[195]

Winters is presently pending a hearing en banc. If the decision of the panel holds, it will mean that a large number of black prisoners in the state penitentiary are entitled to post-conviction relief. The decision thus has tremendous ramifications. Moreover, the case brings into sharp focus the whole problem of racial polarization in our society and the effect that polarization has on the operation of our system of justice.

In most cases the issue of racial discrimination in jury selection has been raised as a post-conviction remedy, usually in a collateral attack on the conviction by petition for writ of habeas corpus. In at least three cases, however, black citizens and civil rights lawyers have affirmatively attacked the problem through class action suits in federal court for injunctions to enforce the adoption of jury selection procedures which will produce jury panels with a fair cross section of the racial makeup of the voting lists.

In *Ford v. White*,[196] black citizens of Issaquena County brought a class action against the board of supervisors for an injunction to eliminate discrimination on the basis of both race and sex in the jury selection system of that county. The Fifth Circuit found that on every one of six successive venires, the percentage of blacks was less than the percentage of black voters on the master list, and in five out of six cases, the disparity was substantial. The court found:

> The defendant officials have not met the burden of coming forward with affirmative and constitutionally acceptable explanations of the evident disparity. The stark handwriting on the wall of the figures themselves is not erased by the testimony that the names are drawn from the wheel at random.[197]

The court also held that where the voter registration list also contained names of women, it was not sufficient to have only a token number of women actually selected for jury service. The case was remanded with directions for the district court to bring the record up to date and take a new, searching look to determine if discrimination exists, either as to race or sex.

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[195] 466 F.2d at 1395.

[196] 430 F.2d 951 (5th Cir. 1970).

[197] *Id.* at 954.

2. Discrimination in Law Enforcement

Law enforcement is another area of judicial administration in which the participation of Mississippi minority groups was and continues to be noticeably absent. By and large, the few blacks hired by local police forces in recent years have been assigned and have had authority limited to black communities. As to state law enforcement, it was not until 1971, in *Morrow v. Crisler,*[198] that the patrol's discriminatory hiring practices were successfully litigated. The implications and impact of this decision should be significant.

In cases where black people have been killed by police or are alleged to be the victims of police brutality or harassment, and prosecuting attorneys and grand juries are unwilling to bring indictments so that the issues can be tried in court, civil rights lawyers have no alternative but to resort to actions for civil damages under federal statutes.[199] In such cases the recovery of monetary damages is not the only objective; another primary purpose is to discourage similar occurances in the future. With few exceptions, the litigation has not been successful, either in recovering damages or stopping continued police brutality. Juries dominated by whites have been unwilling to return verdicts against white law enforcement personnel.

Two section 1983 cases illustrate the importance this type of lawsuit can have in exerting a psychological impact on public officials accused of violating the civil rights of citizens. *Roberts v. Williams*[200] held the superintendent of a penal farm negligent in failing to instruct a trusty guard in the use of his weapon. The trusty was holding a loaded shotgun when it discharged into the face of a black juvenile resting on the ground in front of him. In *Anderson v. Nosser*[201] a large group of black demonstrators was arrested (under an ordinance later found unconstitutional) and transferred 200 miles away to the maximum security unit of Parchman Penitentiary without being brought before a magistrate.

1984 CCH EMP. PRAC. DEC. ¶ 7563 (S.D. Miss. 1971), discussed in more detail in note 222 *infra.*

1942 U.S.C. § 1983 (1970) reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

200302 F. Supp. 972 (N.D. Miss. 1969), *modified,* 456 F.2d 819 (5th Cir. 1971) (Addendum, April, 1972), *cert. denied, sub nom.* Roberts v. Smith, 404 U.S. 866 (1971).

201438 F.2d 183 (5th Cir. 1971), *modified on rehearing en banc,* 456 F.2d 835 (5th Cir. 1972).

The arresting police chief was held liable as a matter of law for failing to bring the misdemeanants before a magistrate. The Superintendent of Parchman was held liable as a matter of law for summary punishment (described as "subhuman") which denied the demonstrators due process of law.

Griffin v. Breckenridge[202] is also an important precedent. It did not involve law enforcement personnel and is therefore not strictly an administration of justice case, but it extended the mantle of protection from violation of civil rights by law enforcement officials to violations by private citizens. *Griffin* was an action for damages on behalf of passengers in a car stopped on the highway who were detained and beaten by a number of whites. The United States Supreme Court ruled that 42 U.S.C. section 1985(3)[203] applied to acts of private discrimination and that no state action need be shown. The case put whites on notice that, at least in federal courts, they could be held liable for such lawless action.

3. Penitentiary Reform

Some of the constitutional issues raised in *Roberts* and *Anderson* concerning the administration of penal institutions came to full flower and application in the landmark decision of *Gates v. Collier*.[204] In that case, also brought under section 1983 and its accompanying enforcement provisions, the plaintiffs sought both a declaratory judgment and injunctive relief to alleviate several oppressive conditions and practices at Parchman, the Mississippi State Penitentiary.

The plaintiffs (a class composed of all present and future inmates) alleged that they were deprived of rights guaranteed by the United States Constitution by being subjected to cruel and unusual punishment, arbitrary censorship and suppression of mail, and deprivation of due process of law in the administration of punishment. Further, all black inmates alleged that they were denied equal protection under the law by being segregated from other inmates and by being incarcerated under conditions far worse than those provided to other inmates. On

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202 403 U.S. 88 (1971).

203 42 U.S.C. § 1985 (3) (1970), reads in part:

> If two or more persons . . . conspire or go in disguise on the highway . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages . . . .

204 349 F. Supp. 881 (1972).

September 13, 1972, the Federal District Court of the Northern District of Mississippi issued its findings of fact and conclusions of law generally upholding the claims of the plaintiffs, and laying the ground work for an order entered on October 20.[205]

In its ruling the court paid particular attention to the issues of discipline, the armed trusty system, and the physical conditions to which inmates were subjected, but it did not mention other important issues such as working hours, pay for inmates, personnel practices, deprivation of good time, censorship and suppression of reading material, access to the press, or religious freedom. The court issued weak rulings on issues as basic as segregation, discrimination, and administrative due process rights.

The court found that fear of cruel and arbitrary punishment was the main factor in maintaining discipline. There were two general types of disciplinary sanctions used at Parchman, informal and formal. Informal punishments such as making a man stand on a soft-drink crate for up to 12 hours at gunpoint,[206] putting a "gun on" a man,[207] and corporal punishment of many varieties were found to abound. Formal disciplinary actions were often just as severe, and included deprivation of good time, loss of certain or all privileges, transfer to a punishment camp, or confinement in the Maximum Security Unit (MSU) which included up to 72 hours in a strip cell officially termed the "dark hole" for obvious reasons.

In its finding of facts, the court noted:

> Although Superintendents Cook and Collier have issued instructions prohibiting mistreatment in the enforcement of discipline, the record is replete with innumerable instances of physical brutality and abuse in disciplining inmates who are sent to MSU. These include administering milk of magnesia as a form of punishment, stripping inmates of their clothes, turning the fan on inmates while naked and wet, depriving inmates of mattresses, hygienic materials and adequate food, handcuffing inmates to the fence and to cells for long periods of time, shooting at and around inmates to keep them standing or lying in the yard at MSU, and using a cattle prod to keep inmates standing or moving while at MSU. Indeed, the superintendents and other prison officials acquiesced in these punishment procedures.[208]

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[205] *Id.*

[206] Some men were shot when they fell off the crates in exhaustion (Government Exhibits, Gates v. Collier, 349 F. Supp. 881 (1972)).

[207] One sergeant reportedly favored the practice of putting his shotgun in the mouth of a kneeling prisoner and making him beg for his life. (Plaintiffs' Proposed Order, Gates v. Collier, 349 F. Supp. 881 (1972)).

[208] 349 F. Supp. at 890.

Punishment of women prisoners sometimes includes

> . . . close clipping of their hair and placing them in a small outbuilding approximately 6' x 6', with no heat, a blank bed, a commode but no other facilities, and lighted by two small slits under the roof. While they are not stripped of their clothing, they sleep on a blank bed and the comment was made that one had to be careful that the women didn't freeze when placed there in the winter time.[209]

The record showed that these punishments were imposed mainly for violations such as failure to work in a satisfactory manner (*e.g.*, fulfilling a cotton picking quota), disrespect to staff members, laziness, "agitating," or insubordination.[210] To remedy this situation the court in its order of October 20, 1972, enjoined the more cruel of the above practices and specifically enjoined the use of corporal punishment. The court did not, however, make specific provisions for a monitoring apparatus to oversee enforcement of its degree.

The lawsuit also attacked the competency of the civilian personnel. At the time of filing, all the administrative officials were white, their educational level averaged around the eighth grade, and the majority had been policemen or farm workers prior to hiring. Commenting on the armed trusty system, the court said:

> Payoffs, favoritism, extortion, and participation in illegal activities have influenced the process of recommending and selecting trusties.
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> . . . .
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> Penitentiary records indicate that many of the armed trusties have been convicted of violent crimes and that, of the armed trusties serving as of April 1, 1972, 35% had not been psychologically tested, 40% of those tested were found to be retarded, and 71% of those tested were found to have personality disorders. There is no formal program at Parchman for training trusties and they are instructed to maintain discipline by shooting at inmates who get out of the gun line . . . . Trusties have abused their position to engage in loansharking, extortion, and other illegal conduct . . . . The evidence indicates that the use of trusties who exercise authority over fellow inmates has established intolerable patterns of physical mistreatment. For example, during the Cook administration, 30 inmates received

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[209] D. BREWER, REPORT TO THE PENAL INSTITUTIONS LEGISLATIVE STUDY COMMITTEE 42 (1970). Mr. Brewer is the Administrator of Corrections Division, Institute of Government, at the University of Georgia. The study was made possible by a grant from the Law Enforcement Assistance Administration.

[210] 349 F. Supp. 881 (1972) (Government exhibits); *accord* BREWER, *supra* note 209, at 31.

> gunshot wounds, an additional 29 inmates were shot at, and 52 inmates physically beaten.[211]

The court ordered the defendants to commence phasing out the trusty system immediately.

In the area of administrative rights, that court set up procedural safeguards for a disciplinary hearing: the accused prisoner should have written notice of the charges against him and an opportunity to respond to those charges in a hearing conducted by an impartial tribunal.

The court also ordered that desegregation begin immediately, but no completion date for the desegregation was established.

The most important potential limitation of *Gates* is that the order has been styled in such a way as to place the full responsibility for designing and implementing the necessary changes solely in the hands of the delinquent defendants. Enforcement of this order will, in many respects, depend on the good faith of the prison officials, which has not been apparent in the past. For example, in 1971, after it was proved that the "heat stroke" death of Danny C. Bennett was indeed a murder and that trusties at the Maximum Security Unit were beating inmates with the full acquiescence of civilian authorities up to and including the superintendent,[212] legislation was passed prohibiting corporal punishment except under special circumstances.[213] *Gates* brought before the court many instances of beatings after such practices had been clearly outlawed by the legislature.

4. Juvenile Detention and Rehabilitation

A significant part of the work of the OEO programs has been the representation of children who are the victims of adult delinquency. Two cases are particularly worthy of note. In the first case, *Crump v. Board of Trustees,*[214] a class action for injunctive and declaratory relief resulted in the elimination of a merit point system which had previously been used by the training schools in determining each child's period of confinement. The ground of the complaint was that the merit point system was arbitrary and was not related to the child's process of rehabilitation. The passage of time without rule infractions was the principal factor

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[211]349 F. Supp. at 889.

[212]Inmate Danny C. Bennett allegedly died from a "heat stroke," but an autopsy later revealed that he had been beaten to death. State *ex rel.* Bennett v. Cook, Civil No. GC 7112-K (N.D. Miss. Feb. 17, 1971), A section 1983 wrongful death action was settled by the entry of an agreed order.

[213]MISS. CODE ANN. § 7698 (Supp. 1972).

[214]No. 72 J - 88 (N) (S.D. Miss. June 29, 1972).

used in determining the time for release. The use of the system resulted in some children being held beyond the time when they should have been released and others being released too soon. After the suit was filed the Board of Trustees met and rejected the merit point system for "a program of individualized treatment and study for each student,"[215] and the board's action was incorporated in an agreed order. The new system for determining each child's length of stay in the training school has the potential for being more compatible with the concept of rehabilitation.

Patterson v. Hopkins,[216] was a class action for injunctive and declaratory relief against the youth court judge, and other public officials of Coahoma County and the City of Clarksdale to prohibit the detention of children in the Coahoma County Jail. The complaint charged that juveniles were detained in the adult jail facility, in close proximity to adult prisoners; that juveniles were not provided with basic necessities and were afforded no particular care or treatment. The district court refrained from declaring any of the alleged practices to be unconstitutional, but the court did order the defendants to place in effect a proposal which defendants had voluntarily made for remodeling the juvenile quarters within the jail to make them more satisfactory for the detention of children.

E. Economic Rights and Entitlements

1. Discrimination in Municipal Services

The thrust of this group of cases has been to obtain for minority groups the property rights or services to which they are entitled as citizens. Emphasis is on the word "entitled," as opposed to privileges or benefits, for the effect of the cases has been to eliminate the barriers of racial and economic discrimination which have heretofore prevented minority groups from enjoying the kinds of income and services which members of the majority population have enjoyed.

In the opening paragraph of the court's opinion in *Hawkins v. Town of Shaw,*[217] Judge Tuttle said:

> Referring to a portion of town or a segment of society as being "on the other side of the tracks" has for too long been a familiar expression to most Americans. Such a phrase immediately conjures up an area characterized by poor housing, overcrowded conditions and, in short, overall deterioration. While there may be many reasons why such areas exist in nearly all of our cities,

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[215] *Id.,* court order at 2.

[216] 350 F. Supp. 676 (N.D. Miss. 1972).

[217] 437 F.2d 1286 (5th Cir. 1971).

> one reason that cannot be accepted is the discriminatory provision of municipal services based on race. It is such a reason that is alleged as the basis of this action.[218]

In the footnote to the quoted paragraph, the Fifth Circuit panel in *Shaw* noted prophetically that although the question had been dropped on appeal, "the Supreme Court has stated that wealth as well as race renders a classification highly suspect and thus demanding of a more exacting judicial scrutiny."[219]

In *Shaw,* the court found that the municipality had provided various municipal services, including street paving, street lights, sanitary sewers, surface water drainage facilities, water mains, fire hydrants, and traffic control signs in a racially discriminatory manner. The evidence was sufficient to establish a prima facie case of racial discrimination, whereupon it became incumbent on the defendants to demonstrate a compelling state interest to justify the disparity. The court said:

> Because this court has long adhered to the theory that "figures speak and when they do Courts listen," . . . we feel that appellants clearly made out a prima facie case of racial discrimination. The trial court thus erred in applying the traditional equal protection standard, for as this Court and the Supreme Court have held: "Where racial classifications are involved, the Equal Protection and Due Process Clauses of the Fourteenth Amendment 'command a more stringent standard' in reviewing discretionary acts of state or local officers." . . .In applying this test, defendants' actions may be justified only if they show a compelling state interest. . . . We have thoroughly examined the evidence and conclude that no such compelling interests could possibly justify the gross disparities in services between black and white areas of town that this record reveals.[220]

The court further found that no intent to discriminate need be shown, that "[i]n a civil rights suit alleging racial discrimination in contravention of the Fourteenth Amendment, actual intent or motive need not be directly proved. . . ."[221]

The relief afforded by the court in *Shaw* was to require "that the Town of Shaw, itself, submit a plan for the court's approval detailing how it proposes to cure the results of the long history of discrimination which the record reveals."[222]

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[218]*Id.* at 1287.

[219]*Id.* at 1287. However, the Supreme Court's recent decision in San Antonio Indep. School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973), would seem to limit the Court's observation on this point.

[220]437 F.2d at 1288.

[221]*Id.* at 1291-92.

[222]*Id.* at 1293.

Shaw required meticulous preparation; the fact-gathering process for such a case being tedious, time consuming, and expensive. Nevertheless, the case is a landmark precedent, and many other municipalities in Mississippi are vulnerable to challenges similar to *Shaw*.[223]

2. The Right to Employment

The right to earn a livelihood and be productive, the right not to be beholden to the rest of society, and the right to have the kind of independence that only gainful employment can bring under our existing socio-economic system, is as fundamental as the more conventional rights protected by our Constitution. Therefore, when citizens are denied employment because of their race, or when members of minority groups are relegated to less challenging and less remunerative employment because of their race, the discriminatory practices can be challenged in court.

As the civil rights movement has shifted from direct confrontation politics to a struggle for political and economic power, employment discrimination cases have become increasingly important. Two basic remedies are available: (1) the post-Civil War civil rights acts[224] and (2) Title VII of the Civil Rights Act of 1964.[225] Both are being utilized by lawyers representing plaintiffs in employment discrimination cases.

Madlock v. Sardis Luggage Co.,[226] which was settled and resolved by the entry of an agreed decree, illustrates the results of a successful employment discrimination case. The consent order provided: (1) for an award of 120 thousand dollars to be distributed among the plaintiffs and the class they represented in accordance with a formula appended to the

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[223]Harris v. Itta Bena, No. GC-6756 (N.D. Miss., filed Nov. 21, 1967), was filed along with *Shaw* and is presently being worked out by agreement. In October, 1972, the parties in Brooks v. Town of Sunflower, No. BC 7157-K (N.D. Miss., filed May 27, 1971), accepted a suitable plan to provide adequate sewage, water systems and fire hydrants to the town's black citizens equal to those in the white community. The total cost of the proposed improvements is 500 thousand dollars. Defendants in *Brooks* have also admitted that the street paving, drainage ditches, and street lighting system in the black portion of town is inadequate as compared with the white residential district. The parties have agreed on a plan for street paving and the installation of street lighting. They have only to work out the details of a drainage ditch system before the case is completely settled.

For a thorough consideration of the *Shaw* decision and the providing of municipal services on a non-discriminatory basis, *see* Comment, *Equal Municipal Services for the Other Side of the Tracks*, 43 Miss. L.J. 67 (1972).

[224]42 U.S.C. §§ 1981-83 (1970).

[225]42 U.S.C. § 2000 (e-h) (Supp. 1971).

[226]3 CCH Emp. Prac. Dec. ¶ 8149 (N.D. Miss. 1971).

order; (2) for an award of 25 thousand dollars for plaintiffs attorneys fees and expenses; (3) for retroactive benefits for the plaintiffs who were offered and accepted employment; (4) for a period of 4 years the defendant was required to hire two blacks for every white until its employee work force contained a ratio in proportion to the racial make-up of the population of Panola County as reflected by the 1970 census; (5) for blacks who quit their jobs to be replaced by blacks; (6) for the defendant to be prohibited from increasing its standards of employment; and (7) for defendant to be required to make periodic reports to plaintiffs' counsel for a period of 4 years.

The issue in *Scott v. Douglas & Lomason Co.*[227] was racial discrimination in promotions to skilled crafts and supervisory categories. The plaintiffs contended that blacks had been hired for menial tasks only. The case was also settled after the discovery process was completed. The settlement called for 10 thousand dollars to be awarded to the three named plaintiffs, and that 80 percent of all future job openings in skilled crafts and supervisory categories be awarded to black employees until the ratio of employees in these categories reflected the racial ratio in the plant as a whole, which was 60 percent black.

The nature of the Title VII suits is such that plaintiffs are usually required to prove the allegations of the complaint by resort to the defendant's records or to the records of the Mississippi Employment Security Commission (MESC), which means that discovery proceedings in such cases are of particular importance. Three reported cases in Mississippi have established plaintiffs' right to liberal discovery. In *Scott* the court said that "liberal discovery is peculiarly appropriate to suits of this character and that discovery is subject to only the narrowest restrictions."[228]

Carr v. Monroe Manufacturing Co.[229] held that the records of the Mississippi Employment Security Commission are not privileged; that applicable records would have to be produced by the commission in cases of this type; that the officials of MESC would not be allowed to block out names and addresses of applicants for employment; and that the district court had ample authority and ability to issue protective orders to safeguard the privacy of individuals who might be affected thereby. Similarly, *Fears v. Burris Manufacturing Co.*[230] involved the power of the federal court to compel MESC, a state agency, to produce its records, MESC having argued that Mississippi law created an ab-

227CCH EMP. PRAC. DEC. ¶ 8006 (N.D. Miss. 1970).

228*Id.*

229431 F.2d 384 (5th Cir. 1970).

230436 F.2d 1357 (5th Cir. 1971).

solute privilege that prevented it from producing its records in a court proceeding. The Fifth Circuit held that a federal court has the power to require disclosure of the records despite the existence of any state rule holding the communications to be privileged.

The important question of prospective employees' ability to raise claims of discrimination against presently employed workers was litigated in Mississippi in *Carr v. Conoco Plastics, Inc.*[231] (later Monroe Manufacturing Company). In *Carr,* the court held that in a situation where the plaintiffs were the only prospective employees, and they were members of the class who had been denied employment, it was proper for them to bring a class action on behalf of themselves as well as on behalf of blacks who were employees of the defendants, with respect to intra-plant discriminatory practices. The court held that if a situation should arise where the prospective employees and those who were already employed had adverse interests, the court had ample power and authority to realign the parties.

From a historical and political standpoint, the most important employment discrimination case in Mississippi is *Morrow v. Crisler,*[232] the suit that desegregated the Mississippi State Highway Safety Patrol. Although the relief afforded to plaintiffs fell far short of expectations, given the obvious pattern of discrimination found by the court, the decision has had and will continue to have an important prospective effect.[233]

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[231]295 F. Supp. 1281 (N.D. Miss. 1969), *aff'd,* 423 F.2d 57 (5th Cir. 1970), *cert. denied,* 400 U.S. 951 (1970). In affirming the district court's judgment for plaintiffs, the Fifth Circuit reasoned as follows: "It is foolhardy to say that once plaintiffs have removed racial discrimination practices at the door, they are required to start anew in order to remove those that exist on the inside." 423 F.2d at 65.

[232]CCH EMP. PRAC. DEC. § 8119 (S.D. Miss. 1971) (on motions to dismiss and for summary judgment), 4 CCH EMP. PRAC. DEC. § 7563 (S.D. Miss. 1971) (decision on merits), 4 CCH EMP. PRAC. DEC. § 7541 (S.D. Miss. 1971) (order following decision on merits), 4 CCH EMP. PRAC. DEC. § 7585 (S.D. Miss. 1971) (awarding attorneys' fees).

[233]In *Morrow* the district court made detailed findings of fact and conclusions of law, following which a detailed order was entered affording both declaratory and injunctive relief. The nature of the order by the court, however, was all of a negative character; *i.e.,* the court prohibited in very specific terms all of the various discriminatory practices it had found to exist in the operation of the defendant agency. The decree did not, however, order any of the affirmative relief requested by the plaintiffs. The court refused to order the named plaintiffs to be hired, or to award them back pay from the date of their original applications to the date of the order. The court also refused to order the defendants to implement any kind of policy of recruitment that would require the defendants to increase the number of black officers on the Mississippi Highway Patrol by giving preference to blacks. After entry of the decree the two named plaintiffs in *Morrow* pursued their application for em-

Employment discrimination litigation will probably accelerate in the future. Most Title VII cases are now being handled by the public-interest lawyer groups in Mississippi. In all probability, however, private practitioners will become increasingly interested in such litigation for a number of reasons. EEOC is actively seeking to interest private practitioners in the problems of economic discrimination and is conducting seminars on Title VII laws and procedures. Private practitioners will probably become interested in representing women in the assertion of their claims against sexual discrimination. Finally, the statute provides for the allowance of attorneys fees, which means that Title VII cases are fee generating cases.[234] The OEO programs have been handling Title VII cases thus far only when private practitioners have been unwilling to do so. As the private bar assumes responsibility for this field of work, the publicly financed programs will no longer be compelled to handle these cases.

3. Welfare Rights

In the field of welfare rights the work of the public-interest groups (largely the OEO-funded programs) has been to secure for their clients the monetary payments to which they are entitled under the Social Security Act. The cases therefore involve questions of statutory interpretation. Constitutional issues have been raised, but plaintiff's lawyers have usually been able to secure appropriate relief through interpretation of the Social Security Act by a single judge federal district court, rather than a three-judge court.[235]

The welfare rights cases in Mississippi may be summarized as follows: The state is not required to participate in welfare rights and medical services programs afforded by the federal statutes. If it elects to do so, however, as Mississippi has done, then it must comply with the provisions of those statutes. The state may not, for example, engraft additional eligibility requirements for welfare income or medical services on the federal Social Security Act. Nor may the state establish its own

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ployment. Neither was hired. Plaintiff Morrow was found to be underweight, and plaintiff Magum was alleged to have failed one of the tests. This action, along with the refusal of the court to grant plaintiffs any affirmative relief to alleviate the results of past discrimination, was appealed to the Fifth Circuit which, by a 2-1 decision affirmed the district court decree, and refused to grant any additional relief. Morrow v. Crisler, No. 72-1136 (5th Cir. Apr. 18, 1973).

[234]42 U.S.C. § 2000a-3(b) (1970).

[235] A three-judge court is required when an injunction is sought to prevent state officials from enforcing unconstitutional statutes of state wide application. 28 U.S.C. § 2281 (1970).

time limitations for implementing the provisions of the federal act. In short, if the state elects to participate in the program it must comply with the federal law.

In *Saddler v. Winstead,*[236] for example, the state department of public welfare adopted regulations which had the effect of denying aid for dependent children (AFDC) payments to any welfare mother or other custodian of dependent children who refused to report to state law enforcement offices the names of the parent(s) who had deserted the dependent children. The objective of the regulation, of course, was to require cooperation on the part of the children's custodian in the prosecution of the parent for non-support of the child or children. Suit was filed as a class action on behalf of the custodian (who happened to be grandparents of the children in question) and all persons similarly situated. The plaintiffs refused to report the whereabouts of the children's parents or to otherwise cooperate with the welfare department and state law enforcement authorities in their desire to prosecute the parents for non-support, whereupon the plaintiff's AFDC payments were withheld. Constitutional questions were raised in the complaint but were deferred on motion of the plaintiffs in order that the question of statutory interpretation could be disposed of by a single judge district court.

The court held that "the challenged regulation is invalid on the ground that the regulation imposes a condition of eligibility not authorized by the Act."[237] The court said:

> The effect of the challenged regulation is to withhold aid from a needy and dependent child, otherwise entitled to a grant of ADC assistance, where the parent or other grantee relative refuses to report the absent parent and actively assist law-enforcement officials in his or her prosecution. Through no fault of its own the child is deprived of the aid and assistance which it would otherwise receive pursuant to the provisions of the Act. It is apparent to the Court that the Act and the regulations adopted by the Department of Health, Education and Welfare provide in express terms that a report to law-enforcement officials is not required until after a grant of aid and assistance has been made to the needy and dependent child. The challenged regulation acts to withhold a grant of aid to the needy and dependent child until the parent or grantee relative furnishes law-enforcement officials with information concerning the absent parent, and enters into an agreement to actively assist law-enforcement officials in the prosecution of legal remedies against the absent parent. Thus, the challenged regulation

[236] 332 F. Supp. 130 (N.D. Miss. 1971).

[237] *Id.* at 135.

imposes an additional condition upon the grant of such assistance.[238]

Quarles v. Mathews[239] was very similar to *Saddler,* except that *Quarles* involved an attempt by the state to force the cooperation of custodians of illegitimate children in the prosecution of the children's putative fathers. In *Quarles* the court defined the class as "all mothers or caretakers of illegitimate defendant children residing in the state of Mississippi who would be eligible to receive aid to dependent children (ADC) benefits but for their refusal to report the putative fathers of the dependent children for desertion and non-support."[240]

As is *Saddler,* the court in *Quarles* held that the regulation under attack was an attempt by the state to engraft an additional eligibility requirement onto the Social Security Act, which it could not lawfully do. In so holding, the court recognized the power and right of the state to seek out and prosecute the putative father, and that the welfare department has the obligation under state law to report the mother of an illegitimate child who refuses or neglects to initiate paternity and support proceedings against the putative father. Although it has the right to inform the custodian of its duty to initiate support proceedings, the welfare department was prohibited from taking any legal action against the custodian for her refusal to cooperate or from intimidating her by suggesting that she withdraw her application for AFDC payments.

In another important case, *Triplett v. Cobb,*[241] the state of Mississippi was held liable for Medicaid payments to caretaker relatives, as well as to the dependent children under their care. The decision afforded Medicaid payments to 27,316 persons who had theretofore been denied such payments under state welfare regulations.

In *Triplett* the court defined the class of plaintiffs as "all needy parents and other needy caretaker relatives who are recipients of AFDC grants in the state of Mississippi and who have been excluded by defendants from receiving benefits under the Mississippi Medical Assistance Program."[242] The question posed by the court was whether plaintiffs, as well as the dependent children under their care, were actually "qualified for public assistance grants"[243] under Title IV of the Social Security Act. The court held that they were qualified, finding that

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[238]*Id.*

[239]No. WC 72-6-S (N.D. Miss. Dec. 18, 1972).

[240]*Id.* final decree at 1.

[241]331 F. Supp. 652 (N.D. Miss. 1971).

[242]*Id.* at 661.

[243]*Id.* at 655.

plaintiffs' needs were considered in the determination of the needy family's AFDC grant and that this was a mandatory provision included in the state's plan pursuant to 42 U.S.C. section 602(a)(7). The court also held that

> the regulation promulgated by the Mississippi Department of Public Welfare stating [that]: ". . . In ADC the eligible children are the recipients and are thus the ones eligible for medical services." is [sic] in conflict with the "federal and state statutes" heretofore specified and is an erroneous interpretation of provisions defining persons who are receiving money payments from Mississippi's "Aid to Dependent Children" program.[244]

Retroactive medicaid payments were awarded to the named plaintiffs and to all parents and other caretaker relatives who were receiving assistance under the AFDC program, retroactive to October 29, 1970, the date on which the welfare department was notified by the Department of Health, Education, and Welfare, that its questioned regulation was in violation of the Social Security Act.

Another attempt by the state to engraft an additional eligibility requirement onto the AFDC statute was struck down in *Thomas v. Mathews*.[245] There, a provision of section 172 of the Mississippi Code which defined a "dependent child" (for 16- and 17-year-olds) as one "regularly attending school" or disabled from attending school, was declared to be in violation of the Social Security Act and was therefore held to be invalid and unenforceable. Retroactive benefits were ordered to be paid to the named plaintiffs, but the rights of the other members of the class, defined by the court as "all residents of the state of Mississippi whose aid to dependent children grant has been or in the future will be reduced or terminated because an otherwise eligible family member 16 or 17 years of age is not regularly attending school"[246] were ordered to take effect as of the date of the order.

Finally, two related suits against the State Department of Public Welfare have established the rights of welfare applicants to have their applications acted upon by the Welfare Department within the time limitation specified by regulations of the Department of Health, Education, and Welfare, *i.e.*, within 30 days in the case of AFDC applications,[247] and within 60 days in the case of applicants under the Aid to the Perma-

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[244]*Id.* at 658.

[245]No. 72 J - 34 (N) (S.D. Miss. June 15, 1972).

[246]*Id.* court order at 1.

[247]Hayes v. Mississippi State Dep't of Pub. Welfare, No. 72 J - 143 (R) (S.D. Miss. Mar. 21, 1973).

nently and Totally Disabled Benefits program.[248] Mississippi statutes and welfare department budgetary line item limitations on welfare assistance and administrative costs were declared invalid and unenforceable insofar as they preclude the acceptance or rejection of such applications within the specified time limitation.

4. Property Rights and the 14th Amendment

Not all of the law reform litigation initiated by public-interest groups has been in defense of personal liberty or the enforcement of "civil rights" as that term is traditionally used. In *Lynch v. Household Finance Corp.*,[249] holding that the post-Civil War civil rights acts are applicable to property rights, the Supreme Court said:

> Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth a "personal" right, whether the "property" in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.[250]

The point made by the Court in the foregoing quotation is particularly important to poor people, because they are acutely affected when deprived of their property rights without due process of law. For a person on a marginal or sub-marginal income, access to a secondhand automobile may mean the difference between employment and nonemployment. The loss by a poor family of its equity in furniture and household goods acquired over long years of installment payments is a major catastrophe. The loss of property is certainly a serious matter for anyone, but for the poor it is frequently the difference between a productive existence and destitution.

Four recent cases in Mississippi have applied Supreme Court rulings to invalidate portions of Mississippi statutes which allowed the deprivation of property without due process of law. In *Banks v. Crisler*[251] certain provisions of the Mississippi Safety Responsibility Act[252] were held to be "unconstitutional insofar as they require drivers or owners

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[248]Benton v. Mississippi State Dep't of Pub. Welfare, No. 5038 (N) (S.D. Miss. Nov. 28, 1972).

[249]405 U.S. 538 (1972).

[250]*Id.* at 552.

[251]No. 4958 (R) (S.D. Miss. Sept. 11, 1972).

[252]MISS. CODE ANN. §§ 8285-04 to -07, -29 (Supp. 1972).

of automobiles involved in accidents . . . to post proof of future financial responsibility without an adjudication of the fault or negligence of said owner or driver in such an accident by a hearing which affords basic due process safeguards. . . ."[253] Citing and relying on *Bell v. Burson*[254] the district court declared the applicable sections to be

> void and unenforceable except insofar as they are applied to drivers of automobiles involved in accidents as set forth in § 8285-05 of the Mississippi Code Annotated, and whose fault in such accident has been demonstrated by either (1) a conviction not under appeal, or forfeiture of bail not vacated, of a traffic offense involved with the accident, or (2) a finding of negligence in the accident by judgment against such persons not vacated or under appeal in a Civil Court proceeding.[255]

In *Turner v. Colonial Finance Corp.*,[256] the Mississippi replevin statutes[257] were declared to be void and unenforceable insofar as they authorized the summary seizure of personal property without affording adequate notice and an opportunity for a preseizure hearing to determine possessory rights to the property. In like manner, *Taylor v. Ross*,[258] held the enforcement provisions by summons and seizure of the Mississippi personal property lien statutes[259] to be invalid, and in *James v. Pinnix*[260] the court held that the seizure rights in favor of secured creditors under the provisions of the state's version of the Uniform Commercial Code[261] are unconstitutional on the same ground; *i.e.*, that these statutes allow the seizure of property without adequate notice and hearing to determine the claimant's possessory rights. All three of the possession cases were class actions, and all were based on recent decisions of the Supreme Court of the United States,[262] thus obviating the necessity for convening a three-judge court.[263]

F. Student Rights

Student rights have emerged significantly through court decisions in

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[253]No. 4958 (R), court order at 1 (S.D. Miss. Sept. 11, 1972).

[254]402 U.S. 535 (1971).

[255]No. 4958 (R), court order at 2.

[256]No. 4821 (S.D. Miss. Oct. 5, 1972).

[257]Miss. Code Ann. §§ 2841-69 (1956).

[258]No. 72J-108C (S.D. Miss. Jan. 19, 1973).

[259]Miss. Code Ann. § 341 (1956).

[260]No. 72 J-250 (N) (S.D. Miss. Feb. 14, 1973).

[261]Miss. Code Ann. § 41A:9-503 (Spec. Supp. 1968).

[262]Fuentis v. Shevin, 407 U.S. 67 (1972); Lynch v. Household Fin. Corp., 405 U.S. 538 (1972).

[263]28 U.S.C. § 2281 (1970).

recent years.[264] However, despite the students' improved stature within this country's legal framework, the State of Mississippi has continued to recognize students as mere wards of society.[265] Legal Services and other public-interest law firms have been diligent in protecting student interests for the same reason they have represented the interests of minority groups and the poor — because private practitioners have been unwilling to do so.

Efforts to protect student rights have centered on both student administration conflicts[266] and off campus governmental action.[267] One recent controversy between students and school administrators involved the suppression of a student literary publication by the University of Mississippi.[268] The University refused to grant the students a hearing and a motion for a temporary restraining order was sought. The trial court ordered the University to release the magazine, holding that first and 14th amendment rights had been violated. Relying on *Stacy v. Williams*,[269] the court held that the University was at the least required to provide students with a hearing. In *Stacy* the University had denied a student request to hear speakers of their choice.

Students on the campus of the University of Southern Mississippi had similar difficulty when they attempted to organize a local chapter of the American Civil Liberties Union. Despite numerous decisions prohibiting the type of conduct engaged in by the University of Southern Mississippi, the students were forced into extended litigation in order to protect basic constitutional rights.[270]

School administrators have not limited their powers to decisions concerning purely educational matters, but have extended themselves to questions of individual grooming.[271] Many of the state elementary and secondary schools have adopted student dress codes, prohibiting the wearing of certain types of apparel, and proscribing the length of hair

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[264]Papish v. Board of Curators of the Univ. of Mo., 93 S. Ct. 1197 (1973); Healy v. James, 404 U.S. 983 (1972); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

[265]Stacy v. Williams, 306 F. Supp. 963 (N.D. Miss. 1969).

[266]Bazaar v. Fortune, No. WC 72-28-K (N.D. Miss. May 18, 1972) *aff'd*, No. 72-2175 (5th Cir. Feb. 27, 1973).

[267]Frazier v. Callicutt, No. WC 7277-S (N.D. Miss. Oct. 11, 1972).

[268]Bazaar v. Fortune, No. WC 72-28-K (N.D. Miss. May 18, 1972), *aff'd*, No. 72-2175 (5th Cir. Feb. 27, 1973).

[269]306 F. Supp. 963 (N.D. Miss. 1969) *aff'd*, 432 F.2d 916 (5th Cir. 1970).

[270]University of So. Miss. Chapter of the Miss. Civ. Lib. U. v. University of So. Miss., 452 F.2d 564 (5th Cir. 1971).

[271]Johnson v. Drew Mun. Sep. School Dist., No. GC 7315-K (N.D. Miss., filed Feb. 8, 1973).

for male students.[272] When these school codes seem overly oppressive, or smack of racial overtones, public-interest law firms have been asked to assist the affected students.[273] Success in litigating the validity of these codes apparently has turned on several factors. Student dress code violators must first establish the substantiality of the right involved.[274] For instance, the court will lend a more sympathetic ear to one who has been expelled from school indefinitely, than to the student who has been suspended for a day or two.[275] Secondly, one court of appeals has arbitrarily differentiated high school students rights from college student rights.[276] Finally, most courts will look to procedures employed by school administrators to enforce dress codes. If those procedures fail to provide adequate due process standards, substantive judgments by the school system may be overturned. It is in this last area that Mississippi school officials have often disregarded basic student rights.[277]

Both high school and college students are demanding a greater voice in school policy-making decisions. At several high schools, black students have boycotted classes because of a belief that black teachers, administrators, and students were not being afforded equal treatment.[278] In at least one instance the students were expelled from school. Since no hearings were provided the students, the court enjoined the suspensions and ordered the readmission of those expelled.[279]

A number of Mississippi students have suffered financial hardship as a result of the state's residency statute for tuition purposes.[280] In one instance the University of Mississippi, pursuant to the statutory mandate, declared a lifelong resident of Lafayette County, Mississippi, a nonresident, and demanded the student pay out of state tuition.[281] The

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[272]*See, e.g.,* Oxford Mun. Sep. School Dist. Dress Code.

[273]*See, e.g.,* Johnson v. Drew Mun. Sep. School Dist., No. GC 7315-K (N.D. Miss., filed Feb. 8, 1973).

[274]*See* Pervis v. LaMarque Indep. School Dist., 466 F.2d 1054 (5th Cir. 1972).

[275]*Compare* Black Students of North Fort Myers Jr.-Sr. High School v. Williams, 470 F.2d 957 (5th Cir. 1972), *with* Pervis v. LaMarque Indep. School Dist., 466 F.2d 1054 (5th Cir. 1972).

[276]*Compare* Sherling v. Townely, 464 F.2d 587 (5th Cir. 1972) and Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972), *with* Landsdale v. Tyler Jr. College, 470 F.2d 659 (5th Cir. 1972).

[277]*E.g.,* Bazaar v. Fortune, No. WC 72-28-K (N.D. Miss. May 18, 1972), *aff'd,* No. 72-2175 (5th Cir. Feb. 27, 1973); Stacy v. Williams, 306 F. Supp. 963 (N.D. Miss. 1969).

[278]*See, e.g.,* Brown v. Coffeeville Consol. School Dist. No. WC-7047-K (N.D. Miss. Sept. 19, 1970).

[279]*Id.*

[280]MISS. CODE ANN. § 6800-11 (1) (Supp. 1972) which reads in part, "The residence of a person less than twenty-one (21) years of age is that of the father."

[281]Interview with Bill Joyner, March 20, 1973.

student was born in Lafayette County and had lived there all his life with his mother, however, at a very early age the child's father had deserted the family and had moved to another state. Since under the terms of the statute, the child's residence was that of his father, the student was classified as a non-resident. The University later offered the student a special scholarship to cover his out-of-state tuition, but not before suit was filed.[282]

In other less dramatic cases the University has classified students as non-residents for tuition purposes where the students had moved to Mississippi, paid state taxes, married, and obtained employment in Mississippi. Even though these students have declared an intention to remain in Mississippi, and to make it their home, the state universities have assessed out-of-state tuition.[283]

The question of resident status has arisen in another context equally important to students. With the passage of the Voting Rights Amendment[284] most college students became eligible to vote in federal elections. However, some registrars have refused to accept student voting applications because the students were viewed as transients.[285] Even when the applications are initially accepted by the registrar, the students are required to submit to hearings before the election commission, requirements rarely imposed on non-students.[286] Two suits were filed in north Mississippi contesting these practices. Injunctive relief was obtained in one,[287] and refused in the other.[288]

III. Conclusion

The review of cases in this article does not purport to cover all of the litigation of the poverty-civil rights lawyers in Mississippi. The cases in each category were selected as being fairly representative of the work in that field. Our objectives have been to demonstrate the breadth of the practice and to call attention to the significant changes which have occurred, not so much by planning or design, but in response to critical needs of minority client groups. There has been no attempt to measure the impact of the litigation in precise terms. We do know that

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[282] *Id.*

[283] This information is taken from an otherwise confidential file in the North Miss. Rural Legal Ser. office in Oxford, Miss.

[284] U.S. Const. amend. XXVI.

[285] Horne v. Rackley, No. EC 72-105-S (N.D. Miss., filed Oct. 2, 1972).

[286] Frazier v. Callicutt, No. WC 7277-S (N.D. Miss. Oct. 11, 1972).

[287] No. EC 72-105-S.

[288] No. WC 7277-S.

Triplett v. Cobb[289] had the potential of directly affecting 27,316 people[290] but the nature of that particular case allowed for a precise mathematical report. The impact of the other cases is more difficult to measure. All we can hope to do is demonstrate that some of the more visible bastions of racial and economic discrimination have been successfully challenged and will continue to be challenged in the future.

A frequently debated issue, both within and without the public interest sector, is the selection of the subject matter of public-interest practice. Why are certain cases brought? There is no single answer. One answer is that in a polarized situation some people and causes simply are not able to obtain local counsel. In such a situation many of the fine jurisdictional lines are blurred and matters not ordinarily identified as poverty or civil rights fall to public-interest practitioners by default. A more important and frequently overlooked answer is that the poverty-civil rights lawyers, like all other lawyers, have clients who make demands upon them and to whom they must be responsive. Our experience has been that the clients set priorities, not the lawyers. The cases reviewed in this article have been filed and tried in direct response to client's demands for assistance, usually in a situation of crisis. The mythical allegation that public-interest lawyers are "sociological schemers" is just that — mythical. If the poverty-civil rights lawyers in Mississippi deserve criticism it should be for not providing their clients with the preventive type of counsel that private practitioners provide their clients in business and industry.[291]

We have also sought to reveal, from the vantage point of hindsight, some repercussions resulting from the failure of the organized bar in Mississippi to provide legal representation to minority groups during a period of social change. The net result is that *more* change has taken place than would otherwise have occurred, which is probably as it should be. In citing lack of available counsel as a major reason for the development of the public-interest groups we are not being judgmental. We recognize the fact that even those private practitioners who are in-

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[289]331 F. Supp. 652 (N.D. Miss. 1971).

[290]Defendant's compliance statement, filed subsequent to the court's order, stated that "on or before August 31, 1971, there was mailed to 27,316 persons a notice of their eligibility for medicaid payments in compliance with paragraph 4 of the court order of July 29, 1971."

[291]This article has dealt with litigation only. The work of the poverty legal services programs in providing legal advice and guidance for community and economic development projects; *i.e.*, non-profit corporations, credit unions, cooperatives of various types, child day-care centers, and new business organizations developed by poor people is another subject altogether.

clined to do so, often are not able to provide the type of representation that minority groups need. In our complex era of specialization they have neither the necessary rapport and identity with the client groups nor the expertise to provide the type of representation that is needed. It therefore necessarily follows that if the organized bar in the state is to help make our judicial system work as it should, it must follow the lead of the American Bar Association and support the continuation of the public-interest groups in order that they provide the kind of representation for minority groups which the bar cannot itself provide. Instead of seeking to curtail aggressive legal services for minority groups, the organized bar should provide both moral and financial support for the continuation of public-interest groups. Only by so doing will the bar, as an organized professional group, have a part in making our adversary system work for everyone.

COUNTY REDISTRICTING IN MISSISSIPPI: CASE STUDIES IN RACIAL GERRYMANDERING

*Frank R. Parker**

I. Introduction

In *Reynolds v. Sims*,[1] the United States Supreme Court established a new constitutional right when it ruled that the equal protection clause of the 14th amendment required that state legislative districts be constructed "as nearly of equal population as is practicable,"[2] and in *Avery v. Midland County*[3] the Court extended this "one-man, one-vote" mandate to require equi-populous districts for the election of members to county governing boards. The purpose of these decisions was to approximate more closely the ideal of democratic representation by equalizing the political power of persons residing in different parts of the state or county, or as one writer has put it, to achieve "equalization of citizen influence on legislative outcomes."[4] In many instances, these decisions will serve to break the stranglehold of the less populated, conservative rural areas on state and local governmental bodies and to make those bodies more responsive to progressive, urban interests.[5] The irony is that this new constitutional requirement, engrafted by the Supreme Court onto the post-Civil War amendment which was designed to secure equal treatment to the freed slaves, has been used in the South, particularly in Mississippi, as a mechanism for minimizing and cancelling out the voting strength of the newly enfranchised descendants of the immediate beneficiaries of the 14th amendment. As a result, the newborn constitutional edict, now less than a decade old, although con-

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[1] 377 U.S. 533 (1964).

[2] *Id.* at 577.

[3] 390 U.S. 474 (1968).

[4] Dixon, *Local Representation: Constitutional Mandates and Apportionment Options*, 36 Geo. Wash. L. Rev. 693, 711 (1968).

[5] R. McKay, Reapportionment: The Law and Politics of Equal Representation (1965).

ceived as a means of accomplishing a more effective franchise, is being used to debase black voting strength, so that constitutionally protected minorities find themselves "disfranchised in result, although technically casting an equal ballot."[6]

The Civil Rights Act of 1964[7] and the Voting Rights Act of 1965[8] opened up opportunities for the registration of the great majority of eligible black citizens and for their free and equal participation as voters in the political processes of Mississippi. Statewide registration of blacks increased from an estimated 28,500 (7 percent of the total registration)[9] to a 1971 estimate of 268,000 (28 percent of the total registration).[10] With this increased registration, blacks have gained election to a substantial number of justice of the peace and constable positions and also have been elected mayor and members of boards of aldermen in several small, predominantly black municipalities.[11] But these are not positions of great influence, and have little or no effect on policy-making by state or county government. Blacks continue to be virtually excluded from the legislative, executive, and judicial branches of state government—there remains only one black representative in the 174-member bicameral Mississippi Legislature. At the county level the key policy-making body is the board of supervisors, which exercises executive, legislative, and quasi-judicial powers.[12] Each member of the board traditionally has been elected from one of five supervisors' districts required by state law to be divided "with due regard to equality of population and convenience of situation for the election of members . . . ."[13] Of the 410 supervisor positions in Mississippi's 82 counties, blacks have won only eight supervisor posts in seven counties.[14]

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[6]Dixon, *supra* note 4, at 694.

[7]42 U.S.C. §§ 1971, 1975a-d, 2000a, 2000h6 (1970).

[8]*Id.* § 1973.

[9]UNITED STATES COMMISSION ON CIVIL RIGHTS, POLITICAL PARTICIPATION 21 (1968) (unofficial statewide totals as of November, 1964).

[10]INSTITUTE OF POLITICS OF MISSISSIPPI (IOP), VOTER REGISTRATION IN MISSISSIPPI (1971). The racial statistics in this report are IOP estimates, based on total figures supplied in most instances by circuit clerks, United States Civil Rights Commission reports, 1970 census data, election returns, and other sources.

[11]MISSISSIPPI CENTER FOR ELECTED OFFICIALS, BLACK ELECTED AND APPOINTED OFFICIALS (1971). As of the 1971 general elections, Mississippi had 128 black elected officials—more than any other Southern State.

[12]MISS. CONST. art. 6, § 170; MISS. CODE ANN. §§ 2870 *et seq.* (1956).

[13]MISS. CODE ANN. § 2870 (1956).

[14]BLACK OFFICIALS, *supra* note 11 (seven blacks elected to supervisor posts in six counties). In addition, black candidate Willie Bunton was elected to the district three supervisor position in a special election in Issaquena County in November, 1972. Delta Democrat-Times (Greenville), Nov. 22, 1972, at 1.

Through changes in the form or shape of election districts, substantial efforts have been made throughout the state to prevent blacks from gaining positions on county boards of supervisors: first, by permitting counties to switch from district elections to at-large countywide supervisor elections—frequently with the effect of cancelling out the opportunities of blacks in black majority districts to gain representation; and second, by racial gerrymandering of election district boundaries. In both instances, these changes were specifically carried out with the stated goal of meeting *Reynolds* and *Avery* requirements, but too frequently they have had the effect of diluting or cancelling out black voting strength.

II. The First Phase: At-Large Supervisor Elections

Although state law required that supervisors' districts be equal in population, few if any boards of supervisors prior to 1965 had redistricted themselves, with the only reported redistricting resulting from federal district court litigation.[15] Because of growth and shifts of population throughout the state, by 1965 supervisors' districts in most counties were severely malapportioned. The Mississippi Legislature addressed this problem in its first regular session after the enactment of the Voting Rights Act by amending section 2870 of the Mississippi Code to permit boards of supervisors to adopt at-large, countywide elections of board members.[16] Several Mississippi counties then opted for at-large supervisors' elections, purportedly as a cure for malapportioned districts. This solution has a certain facial validity, since county wide voting meets the *Reynolds* test "that the vote of any citizen is approximately equal in weight to that of any other citizen . . . ."[17] and in fact provides for zero deviation.[18]

The basic evil of an at-large election scheme in a pluralistic political system, however, is that it provides the dominant party or faction with

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[15]Martinolich v. Dean, 256 F. Supp. 612 (S.D. Miss. 1966); Damon v. Lauderdale County Bd. of Supervisors, 254 F. Supp. 918 (S.D. Miss. 1966).

[16]Act of May 27, 1966, ch. 290, § 1, [1966] Gen. Laws Miss. 374 provided that, "the board of supervisors of any county may adopt an order providing that all the qualified electors of the county shall be eligible to vote for each member of the board of supervisors but each candidate shall be a resident of the district which he proposes to represent . . . ." An order calling for at-large elections of county supervisors could be blocked only by a majority of the countywide vote, after a petition signed by 20 percent of the voters of the county had been filed within 60 days of the adoption and publication of the order, putting the proposition up for a vote. *Id.* (section 2870 was further amended in 1968 and again in 1971. *See* note 32 *supra*).

[17]Reynolds v. Sims, 377 U.S. 533, 579 (1964).

[18]Zimmer v. McKeithen, 467 F.2d 1381, 1382 (5th Cir. 1972), *petition for rehearing en banc granted,* Nov. 17, 1972.

an opportunity to make a clean sweep of all seats. This shortcoming is particularly acute and has serious constitutional dimensions in a racially polarized political system where the dominant factor is white. The 1970 census indicated that there were 135 black majority supervisor districts in 49 of Mississippi's 82 counties.[19] Of these 49 counties, only 25 have countywide black population majorities,[20] only 11 have countywide black registered majorities,[21] and black candidates have succeeded in winning only three countywide elections.[22]

As a result of the implementation of the Voting Rights Act, blacks in a number of Mississippi counties gained a voting majority in particular supervisors' districts, but remained in the minority countywide; thus the switch to at-large elections cancelled out black voting strength in black majority districts, submerging these black district majorities into the white countywide vote.

Adams County, clearly demonstrates this phenomenon. Adams, one of Mississippi's oldest counties, is located on the Mississippi River in the southwestern corner of the state. Its county seat is Natchez, famous for its restored antebellum homes. Subsequent to the passage of the Voting Rights Act, blacks quickly gained a voting majority in district four and in 1967 elected a black constable and justice of the peace. However, in October, 1966, the all-white Adams County Board of Supervisors took advantage of the 1966 amendment to Mississippi Code section 2870 and adopted an order changing the method of supervisors' election from district to at-large elections. This submerged the district four black majority into the countywide white majority and precluded the election of any black candidate from district four to the board.[23]

A. Section 5 Objections to At-Large Elections

In the Voting Rights Act of 1965, Congress wisely provided a procedure for checking changes in election procedures which might have the effect of cancelling out black voting strength gained as a result of

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[19]U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, GENERAL POPULATION CHARACTERISTICS: MISSISSIPPI 26-79 (1971) (Census Publication PC (1) -B26).

[20]*Id.* at 26-40.

[21]VOTER REGISTRATION IN MISSISSIPPI, *supra* note 10.

[22]BLACK OFFICIALS, *supra* note 11.

[23]Facts taken from the pleadings in Marsaw v. Patterson, Civil No. 1201W (S.D. Miss., filed July 14, 1967), *consilidated with* Fairley v. Patterson, 282 F. Supp. 164 (S.D. Miss. 1967), *rev'd sub nom.* Allen v. State Bd. of Elections, 393 U.S. 544 (1969) and Howard v. Adams County Bd. of Supervisors, 453 F.2d 455 (5th Cir. 1972). *See* POLITICAL PARTICIPATION, *supra* note 9, at 22-23.

implementing the voter registration provisions of the Act. In section 5 of the Act,[24] Congress provided that whenever any state or political subdivision, in which literacy and other voter registration tests are suspended by section 4 of the Act,[25] seeks to implement any "standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964,"[26] it must first obtain a ruling from the United States District Court for the District of Columbia or the United States Attorney General that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[27]

After the Adams County supervisors had enacted their switch to at-large, countywide supervisor elections, a black district four voter who had intended to run for the board filed an action against the board of supervisors and election officials charging that the change was racially discriminatory, thus raising the question of whether such a change in election procedures was required to be cleared through section 5 of the Voting Rights Act of 1965 prior to implementation.[28] The district court adopted a restrictive interpretation and held that section 5 was limited to new voter registration requirements and that the change need not be cleared.[29] On appeal, however, the Supreme Court held that because of its potential for cancelling out black voting strength in particular districts, the switch to at-large elections was a change in voting practices subject to the section 5 clearance provisions:

> No. 25 [*Fairley* and *Marsaw v. Patterson*] involves a change from district to at-large voting for county supervisors. The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.[30]

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[24]42 U.S.C. § 1973c (1970).

[25]*Id.* § 1973b.

[26]*Id.* § 1973c.

[27]*Id.*

[28]Marsaw v. Patterson, Civil No. 1201W (S.D. Miss., filed July 14, 1967).

[29]Fairley v. Patterson, 282 F. Supp. 164 (S.D. Miss. 1967), *rev'd sub nom.* Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

[30]Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969). Although a majority held that the election change was unenforceable without prior section 5 clearance, the Court declined to set aside the 1967 elections held on the basis of the challenged statute, with three Justices dissenting on the grounds that refusing "to grant ap-

The Adams County Board of Supervisors and Election Commissioners were enjoined from further at-large supervisors elections until section 5 clearance had been obtained.[31] When the Mississippi Attorney General submitted the 1966 amendment to Mississippi Code section 2870 for approval, the United States Attorney General imposed an objection to its implementation, finding, along with two other statutory amendments enacted simultaneously, that "these amendments had as their purpose and have had as their effect the denial and the abridgment of the right to vote on account of race or color."[32]

In spite of the *Allen v. State Board of Elections* decision and the subsequent section 5 objection, local governing bodies have continued to resort to at-large elections. In one case, involving the municipality of Canton, Mississippi, a three-judge district court simply ignored *Allen* and failed to require section 5 clearance of the change.[33] From Jan-

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pellants . . . the only relief that will effectively implement the Act's purpose . . . [permits] state officials selected in violation of § 5 to hold office until their four-year terms expire in 1971." 393 U.S. at 593. (Harlan, J., joined by Marshall and Douglass, JJ., concurring and dissenting).

In dissent, Justice Black harshly criticized the section 5 clearance provisions, saying:

> This is reminiscent of old Reconstruction days when soldiers controlled the South and when those States were compelled to make reports to military commanders of what they did. The Southern states were at that time deprived of their right to pass laws on the premise that they were not then a part of the Union and therefore could be treated with all the harshness meted out to conquered provinces. The constitutionality of that doctrine was certainly not clear at that time. And whether the doctrine was constitutional or not, I had thought that the whole Nation had long since repented of the application of this "conquered province" concept, even as to the time immediately following the bitter Civil War.

393 U.S. at 595. Although this criticism has been echoed in Mississippi district court decisions, *see, e.g.*, Evers v. State Bd. of Elections Comm'rs, 327 F. Supp. 640, 641 (S.D. Miss. 1971), *appeal dismissed,* 405 U.S. 1001 (1972), the section 5 objections discussed herein indicate that the procedure has performed a useful service.

[31]Marsaw v. Patterson, Civil No. 1201W (S.D. Miss., filed July 14, 1967), *temporary injunction issued,* April 23, 1969.

[32]Letter from Jerris Leonard, Asst. U.S. Attorney General, Civil Rights Div., U.S. Dep't of Justice, to A. F. Summer, Miss. Attorney General, May 21, 1969. Two subsequent amendments to section 2870, Act of May 27, 1968, ch. 564, [1968] Gen. Laws Miss. 946 and Act of April 5, 1971, ch. 493, [1971] Gen. Laws Miss, 615, also attempted to provide for at-large supervisors elections, but the 1968 amendment was not cleared under section 5 and the 1971 amendment was objected to by the United States Attorney General. Letter from David L. Norman, Asst. U.S. Att'y Gen., to A.F. Summer, Miss. Att'y Gen., Sept. 10, 1971. No effort was made to overturn the United States Attorney General's objections through a declaratory judgment action in the United States District Court for the District of Columbia as provided by section 5.

[33]Perkins v. Matthews, 301 F. Supp. 565 (S.D. Miss. 1968), *rev'd,* 400 U.S. 379 (1971).

uary 1970 to March 1972 five Mississippi counties—two of them with black majority districts but black population minorities countywide,[34] and one with black majority districts but a white countywide registered majority[35]—submitted at-large election plans to the United States Attorney General for section 5 clearance. In each case the Attorney General has not permitted the change to be implemented on the ground that, because of his prior objection to the 1966 amendment to Mississippi Code section 2870, boards of supervisors lack the power, under state law, to enact such a change.[36] Further, in two other recent cases, boards of supervisors have attempted to hold at-large supervisor elections without section 5 clearance—in one county with a black population majority but without a black registered majority and in another with a black population majority but with a white voting majority.[37] The Department of Justice failed to take action to block these changes as required under the Act,[38] but injunctions were issued as a result of private lawsuits.[39]

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[34]These were Attala County (40.3 percent black) and Grenada County (43.7 percent black).

[35]Carroll County (50.7 percent black population, 33.3 percent black registration). The other two counties submitting at-large election proposals were Itawamba (5.6 percent black) and Tishomingo (4.4 percent black), neither of which had black population majority districts. All population statistics herein are from 1970 census. U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, GENERAL POPULATION CHARACTERISTICS (1971) (Cenus Publication PC (1) - B26), and all voter registration statistics are from VOTER REGISTRATION IN MISSISSIPPI, *supra* note 10.

[36]Letter from James M. Tolmach, Civil Rights Div., U.S. Dep't of Justice, to Frank R. Parker, Mar. 29, 1972.

[37]Leflore County (57.8 percent black population, 50.0 percent black registration) and Issaquena County, with a black registered majority, but in which no black candidates had been able to gain countywide majorities after several races by different candidates for both supervisor and at-large school board positions, although several candidates did gain majorities in the districts they were running to represent. *See* briefs filed in Hall v. Issaquena County Bd. of Supervisors, 453 F.2d 404 (5th Cir. 1971).

[38]42 U.S.C. § 1973j (d) (1970).

[39]Hall v. Issaquena County Bd. of Supervisors, 453 F.2d 404 (5th Cir. 1971); Moore v. Leflore County Bd. of Election Comm'rs, 351 F. Supp. 848 (N.D. Miss. 1971) (three-judge court).

The failure of the Civil Rights Division of the Department of Justice to take timely action to enjoin uncleared switches to at-large elections is criticized in a recent study of Voting Rights Act enforcement. WASHINGTON RESEARCH PROJECT, THE SHAMEFUL BLIGHT: A SURVIVAL OF RACIAL DISCRIMINATION IN VOTING IN THE SOUTH 149 (1972). On the basis of these and other examples, the report finds

> responsibility [for failure to implement section 5] also lies with the Department of Justice, which has failed to enforce vigorously the requirements of section 5 and to adopt quickly adequate administrative procedures, has left the bulk of section 5 litigation to private parties, and has failed to act quickly or forcefully enough when it has resorted to court enforcement.

Id. at 145.

The analysis of at-large voting efforts for members of county governing boards in Mississippi shows that in most cases such changes have a racially discriminatory effect, and timely objections from the Department of Justice under the much maligned clearance provisions of section 5 of the Voting Rights Act of 1965 have, in many cases, prevented substantial dilutions of black voting strength from taking place. The danger remains, however, given the terse and unexplained sentence in an interlocutory proceeding in the Mississippi legislative reapportionment case that "[a] decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act,"[40] governing bodies bent on circumventing the section 5 clearance provisions will be able to persuade sympathetic federal judges to permit racially discriminatory at-large elections as an alternative to malapportioned districts under the equity powers of the district court. This occurred in at least one heavily black Mississippi delta county in which blacks did not have a voting majority. The district court's order was corrected, however, by the United States Court of Appeals for the Fifth Circuit to allow at-large elections as an interim measure only, to be followed by new supervisor special elections after the court had approved a constitutional redistricting plan.[41]

B. Court Decisions On At-Large Elections

Because at-large elections frequently have the effect of diluting the voting strength of black majority districts, and because of the Attorney General's section 5 objections to state legislation authorizing conversions to at-large elections, federal courts in the South generally have enjoined such changes[42] or have permitted at-large elections only as an interim measure pending redistricting of malapportioned districts, followed by

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[40]Connor v. Johnson, 402 U.S. 690, 691 (1971), *granting stay pending appeal,* unreported district court decision *vacated and remanded sub nom.,* Connor v. Williams, 404 U.S. 549 (1972).

[41]Hall v. Issaquena County Bd. of Supervisors, 453 F.2d 404 (5th Cir. 1971).

[42]Henry v. Coahoma County Bd. of Supervisors, Civil No. D.C. 71-50-S (N.D. Miss. July 7, 1971); LeBlanc v. Rapides Parish Police Jury, 315 F. Supp. 783 (W.D. La. 1969), *remanded sub nom.* LeBlanc v. Rapides Parish School Bd., 431 F.2d 502 (5th Cir. 1970); Dyer v. Love, 307 F. Supp. 974 (N.D. Miss. 1969); United States v. Democratic Executive Comm., 288 F. Supp. 943 (M.D. Ala. 1968); Smith v. Paris, 257 F. Supp. 901 (M.D. Ala. 1966), *modified and aff'd,* 386 F.2d 979 (5th Cir. 1967). *But see* Sheffield v. Itawamba County Bd. of Supervisors, 439 F.2d 35 (5th Cir. 1971) (dictum) (at-large elections permissible as an alternative to malapportioned districts where such change has no racial effect).

special, mid-term elections on a district basis.[43] However, in *Zimmer v. McKeithen,*[44] a recent Louisiana case, the Fifth Circuit approved a district court decree allowing at-large elections for members of the parish police jury and school board even though the parish had substantial black population concentrations but a white registered majority, and in spite of a section 5 objection blocking the implementation of recent Louisiana legislation allowing for at-large police jury and school board elections.[45] The justification advanced was that the parish had a black population majority.[46] Fourteen Mississippi counties[47] come within this category—black population majorities but white registered majorities—and if this decision is allowed to stand it could provide impetus to continued efforts in Mississippi to dilute black voting strength through at-large elections. Even if the parish has a black population majority, the fact that the parish has a white registered majority means that at-large elections must cancel out black voting strength concentrated in particular districts. Therefore, the panel decision of the Fifth Circuit appears inconsistent with all prior decisions disallowing at-large elections as a permanent remedy where they have a disadvantageous racial effect.[48]

The Supreme Court in *Allen v. State Board of Elections,*[49] suggested that switches to at-large elections in Southern counties which dilute the voting power of black majority districts cannot withstand constitutional

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[43]Hall v. Issaquena County Bd. of Supervisors, 453 F.2d 404 (5th Cir. 1971), Moore v. Leflore County Bd. of Election Comm'rs, Civil No. GC 71-84-K (N.D. Miss., Oct. 18, 1971); *cf* Keller v. Gilliam, 454 F.2d 55 (5th Cir. 1972).

[44]467 F.2d 1381 (5th Cir. 1972) *petition for rehearing en banc granted* Nov. 17, 1972.

[45]*See* LeBlanc v. Rapides Parish Police Jury, 315 F. Supp. 783, 788-89 (W.D. La. 1969), *remanded sub nom.* LeBlanc v. Rapides Parish School Bd., 431 F.2d 502 (5th Cir. 1970).

[46]467 F.2d at 1384. In dissent, Judge Gewin commented:

> It is apparent to me that the change to elections at large makes it substantially more difficult for black voters to elect representatives than under the traditional ward system which Louisiana law requires. The at-large election dilutes any possible majority of black registered voters in one or more new and impartially drawn wards with the overall majority of white registered voters in the Parish. It was precisely this sort of dilution which caused the Attorney General to disapprove under § 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, the Louisiana statutes which sought to amend the Louisiana law to allow at large elections for school boards and police juries.

467 F.2d at 1386.

[47]The fourteen counties with black population majorities but without black registered majorities are: Amite, Carroll, Copiah, Humphreys, Jefferson Davis, Kemper, Leflore, Marshall, Noxubee, Panola, Quitman, Sharkey, Washington, and Yazoo. VOTER REGISTRATION IN MISSISSIPPI, *supra* note 10.

[48]*See* cases cited notes 42 and 43 *supra.*

[49]393 U.S. 544 (1969).

scrutiny. This decision generally has been followed by federal courts in the South in striking down at-large voting schemes which have such an effect. How are these decisions to be reconciled with the Supreme Court's more recent decision in *Whitcomb v. Chavis,*[50] in which the Court reversed a district court decision voiding multi-member legislative districts in the face of a district court finding that such districts dilute ghetto voting strength? In *Whitcomb* a three-judge district court had found that the Indiana multi-member district legislative scheme, in effect since 1851 and by which eight of 31 senatorial districts and 25 of the 39 house districts were represented by two or more legislators elected at large by all the voters of the district, violated constitutional guarantees against racial abridgment of the right to vote because of its effect in cancelling out ghetto black voting strength, particularly in Marion County (Indianapolis). The Supreme Court reversed on this issue. Noting that plaintiffs had conceded that Indiana's multi-member district was not intentionally designed to dilute the votes of minorities,[51] the Court held that the underrepresentation of blacks in the state legislature which resulted from this plan "emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls."[52]

The key distinction between *Whitcomb* and the Mississippi experience is the Court's recognition in *Whitcomb* that the Indiana multi-member district scheme represented a long-standing state policy and the Court's emphasis on the absence of any evidence of a past history of racial discrimination in voting.[53] While at-large elections may be tolerable when conceived and first implemented in a racially neutral vacuum and when they have no directly provable racial effect, they are certainly intolerable and constitutionally prohibited when they have the effect of perpetuating past racial discrimination in voting practices. The Supreme Court itself recently endorsed this distinction in *Taylor v. McKeithen,*[54] in which plaintiffs challenged an effort to racially gerrymander legislative district lines in New Orleans. In an instructive footnote, the Court held the *Whitcomb* decision inapplicable, saying:

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[50]403 U.S. 124 (1971), *rev'g* 305 F. Supp. 1364 (S.D. Ind. 1969) (three-judge court).

[51]*Id.* at 149.

[52]*Id.* at 153.

[53]*Id.* at 149-50.

[54]407 U.S. 191 (1972).

> The important difference . . . is that in Whitcomb it was conceded that the State's preference for multi-member districts was not rooted in a racial discrimination [citation omitted]. Here, however, there has been no such concession and, indeed, the District Court found a long "history" of bias and franchise dilution in the State's traditional drawing of district lines.[55]

Where newly enfranchised black voters may be continually outvoted by white voting majorities in at-large districts, the effect, as the Court noted in *Allen,* is the same as continuing to prevent blacks from voting at all.[56] Although not specifically articulated, this rationale perhaps persuaded the Supreme Court to express a preference against multi-member legislative districts in the recent Mississippi legislative reapportionment case of *Connor v. Johnson,*[57] and has recently provided the express basis in two recent three-judge district court decisions for voiding multi-member legislative districts in Alabama and Texas.[58]

The Mississippi experience shows that at-large voting may constitute a partially subtle form of racial gerrymandering, and, particularly when it occurs on the heels of a prior history of racial discrimination in voting, violates constitutional guarantees. Implicit in these decisions is the notion that since blacks have now been granted the right freely to register and vote by federal legislation, Southern States are under an affirmative obligation to draw election district lines in a manner which does not cancel out newly gained black voting strength.[59]

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[55]407 U.S. at n.3.

[56]Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

[57]402 U.S. 690 (1971) (interlocutory order pending appeal), *decision on merits sub nom.,* Connor v. Williams, 404 U.S. 549 (1972).

[58]Sims v. Amos, 336 F. Supp. 924 (M.D. Ala. 1972) (three-judge court), *aff'd,* 409 409 U.S. 942 (1972); Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972) (three-judge court) (*Graves* was a consolidated case in the district court. On appeal, the Supreme Court granted independent relief in the separate cases.), *prob. juris. noted sub nom.* Bullock v. Register, 409 U.S. 840 (1972), *aff'd per curiam sub nom.* Archer v. Smith, 409 U.S. 840 (1972) (only as to gerrymandering against Republican voting strength in Bexar County), *stay of injunction denied sub nom.* Bullock v. Carter, 405 U.S. 1201 (1972) (injunction enjoining multi-member districts). For a recent discussion of these cases, *see* Derfner, *Multi-Member Districts and Black Voters,* 2 Black L.J. 120 (1972).

[59]The Fifth Circuit recently has reversed the dismissal of a complaint challenging the long-standing practice of at-large election of members of the Dallas, Texas City Council and held that the practice would violate constitutional guarantees if it can be shown that at-large voting results in a denial of "effective participation in the political process." Lipscomb v. Johnson, 459 F.2d 335, 339 (5th Cir. 1972).

III. The Second Phase: Gerrymandering of District Boundaries

As the above discussion indicates, switching to at-large elections can be a form of racial gerrymandering where the result is to permit white countywide majorities to sweep all the seats in counties where blacks, as a minority of the voting population, are concentrated in particular districts. Yet conversion to a single-member district system may not wholly avert the danger of continued white domination. As one political analyst has sagely observed, "It takes but slight reflection to realize that if the dominant party's supporters are spread relatively evenly, that party can win each district under a single-member district system, too."[60] Thus, even under a requirement of district elections, "it may now be perceived that a mandate to reapportion, coupled with a rule of tight arithmetic equality for all districts, creates new opportunities for unfairness in representation (gerrymandering)."[61]

Having generally been deterred from pursuing at-large elections by the Attorney General's section 5 objections, it now appears that some Mississippi counties are resorting to gerrymandering of supervisor district boundaries, with the stated goal of correcting longstanding malapportionment of districts, but with the effect of diluting black voting strength.[62] The results obtained in several of these recent redistricting plans can best be described as "cracking, packing, and stacking."[63] The "cracked"

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[60]R. Dixon, Democratic Representation: Reapportionment in Law and Politics 503 (1968).

[61]*Id.* at 457.

[62]Numerous articles have been written on the definition and criteria of racial and other gerrymandering, concentrating primarily on the criteria of compactness, contiguity, and adherence to pre-existing political subdivision boundaries. *E.g.*, Edwards, *The Gerrymander and "One Man, One Vote"*, 46 N.Y.U.L. Rev. 879 (1971); Sickels, *Dragons, Bacon Strips and Dumbbells—Who's Afraid of Reapportionment*, 75 Yale L.J. 1300 (1966); Schwartzberg, *Reapportionment, Gerrymanders, and the Notion of "Compactness"*, 50 Minn. L. Rev. 443 (1966); Weaver & Hess, *A Procedure for Nonpartisan Districting: Development of Computer Techniques*, 73 Yale L.J. 288 (1963); Krastin, *The Implementation of Representative Government in a Democracy*, 48 Iowa L. Rev. 549 (1963); Vickery, *On the Prevention of Gerrymandering*, 76 Pol. Sci. Q. 105 (1961); Reock, *Measuring Compactness as a Requirement of Legislative Appointment*, 5 Midwest J. Pol. Sci. 70 (1961). Other recent writers have considered the underrepresentation of blacks, or racial malrepresentation, to be the essence of racial gerrymandering. R. Dixon, Democratic Representation: Reapportionment in Law and Politics (1968); Dixon, *The Court, the People, and "One Man, One Vote"*, in Reapportionment in The 1970's (N. Polsby ed. 1971); Gilliland, *Racial Gerrymandering in the Deep South*, 22 Ala. L. Rev. 319 (1970).

[63]These terms were first coined in the non-racial context of population malapportionment and urban gerrymandering in Tyler, *Court versus Legislature: The Socio-Politics of Malapportionment*, 27 Law & Contemp. Prob. 390, 400 (1962).

district, in racial gerrymandering terms, is an area of heavy black concentration, often within a municipality and frequently formerly included within a single district, fragmented into separate pieces, each of which is attached to a larger white majority, often contained in the surrounding rural area.[64] The "packed" district is one into which black population and black voters are concentrated, containing many more black persons than neighboring districts: the gerrymandering in *Wright v. Rockefeller*[65] is a good example. The result may or may not be invidiously discriminatory, depending on voting patterns.[66] The "stacked" district dilutes black voting strength by combining in irregularly shaped districts, which abandon pre-existing boundaries, concentrations of black population (often large enough for separate representation) with greater concentrations of white population to create overall white majorities.[67] The "stacked" district often is the most obvious form of gerrymander, described by the originator of the term as "a delicately carved creature, resembling nothing more than the partisan and rapacious soul of his political creator."[68]

The proposed redistricting plans for Yazoo and Warren Counties in Mississippi provided excellent examples of "cracked" districts. In each instance, former black majority districts were cracked under the new redistricting plan, and segments of black population concentration were fragmented among several new districts. Significantly, in each case the area of heaviest black concentration was within the major municipality in the county, and under the new plan this heavy urban black population concentration, formerly entirely within black majority districts, was split

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[64]Although the term was not used, "cracked" districts were ruled unconstitutional in Bussie v. Governor of Louisiana, 333 F. Supp. 452 (E.D. La. 1971), *modified and aff'd sub nom.* Bussie v. McKeithen, 457 F.2d 796 (5th Cir. 1971), *vacated sub nom.* Taylor v. McKeithen, 407 U.S. 191 (1972), and Klahr v. Williams, 339 F. Supp. 922, 927 (D. Ariz. 1972), and in a non-racial context in Troxler v. St. John the Baptist Parish Police Jury, 331 F. Supp. 222 (E.D. La. 1971). To date, "cracking" of black majority districts has not been held unconstitutional by the Fifth Circuit or the Supreme Court, although this conclusion may be implied from the Supreme Court's recent decision in Taylor v. McKeithen, 407 U.S. 191 (1972).

[65]376 U.S. 52 (1964).

[66]Packing was attacked in *Wright* because it prevented New York blacks from influencing the outcomes in more than one Congressional district. In the South, where bloc voting along racial lines, with some exceptions, generally prevails, packing may be the only means by which blacks can elect representatives of their choice.

[67]Although the term was not used, "stacked" districts were ruled unconstitutional in Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965), but have yet to be unequivocally struck down by the Fifth Circuit or the Supreme Court. *See* POLITICAL PARTICIPATION, *supra* note 9, at 27-30.

[68]Tyler, *supra* note 63, at 401.

among all five districts, each new district combining an urban, heavily black segment with an outlying rural, predominantly white segment. The result in each case was a devastating dilution of black voting strength, destroying black district majorities and creating new white district majorities.

Yazoo County. Prior to voluntary redistricting by the board of supervisors in 1970, the urban black concentration in the county seat, Yazoo City (60 percent black), had been included entirely within district three, but under the redistricting plan this urban black concentration was fragmented and dispersed among all five districts, none of which could be described as compact (see Appendix A).[69] The submission of the plan to the Department of Justice led to a section 5 objection on grounds that the resulting districts, devised to correct malapportionment, were themselves malapportioned and diluted black voting strength.[70]

Warren County. Three of the five supervisors' districts in Warren County, all with black population majorities, had since 1929 been located entirely within the corporate limits of the county seat and principal municipality, Vicksburg (49.3 percent black). But the 1970 redistricting plan abandoned this historic pattern and combined rural and urban areas in all five districts, dividing this heavy black concentration in Vicksburg among five uncompact districts (see Appendix B).[71] Upon submission of the redistricting plan to the Department of Justice, two separate, but similarly based section 5 objections were lodged because "substantial and apparently irreconcilable discrepancies" between the racial population statistics submitted by the board of supervisors (which were not based on census data, but a privately-conducted house count survey) and 1970 census data prevented the Justice Department from

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[69]Facts taken from 1970 census data and deposition of Griffin Norquist, Attorney from the Yazoo County Board of Supervisors, and L. M. Phillips, President of the Board, March 21, 1972, on file in Howard v. Adams County Bd. of Supervisors, Civil No. 72-2596 (5th Cir. May 5, 1971).

[70]Letter from David L. Norman, Asst. Attorney General, Civil Rights Div. U.S. Dep't of Justice, to Griffin Norquist, Attorney for the Yazoo County Board of Supervisors, July 19, 1971. In this letter Norman stated:

> Our difficulty is compounded by the fact that the district boundary lines within the City of Yazoo unnecessarily divide the black residential areas into each of the five districts. These lines do not seem to be related to numeric population configurations, or to considerations for district compactness, or to a standard of regularity of shape.

[71]Facts taken from 1970 census data and deposition of Landman Teller, former Attorney for the Warren County Board of Supervisors, and P.T. Hullum, former President of the Board, April 11, 1970, on file in Howard v. Adams County Bd. of Supervisors, Civil No. 72-2596 (5th Cir., filed June 20, 1972).

determining "if any dilution of such [black population majorities in districts two, three, and four] has a discriminatory purpose or effect."[72]

On a third try Warren County authorities did succeed in producing accurate population statistics for their new districts. On the basis of those figures the Department of Justice found the plan to be racially discriminatory and objected to its implementation:

> On the basis of this information we are unable to conclude, as we must under Section 5, that the changes submitted will not have a prohibited racial effect in Warren County.
>
> ... Our evaluation of the redistricting plan ... reveals that the effect of the proposed district boundary lines is to fragment areas of black population concentrations, thereby minimizing the total number of black persons residing in each of the districts and diluting black voting strength in Warren County. Moreover, it does not appear that the district lines are drawn as they are because of any compelling governmental need and they do not reflect population concentrations in the county or considerations of district compactness or regularity of shape.[73]

Leake County. The Leake County redistricting plan provides a startling example of "stacked" districts in Mississippi. Prior to redistricting, blacks had enjoyed a two-to-one majority in district three, but the new boundary of that district under the 1970 redistricting plan departed its historic course and hooked around the black population concentration in the principal town of Carthage to consolidate white population concentrations and to form a perfect number "1" (see Appendix C).[74] Although the redistricting had been ordered by a federal district court, the district judge wisely ordered it submitted for section 5 clearance by the Justice Department,[75] which objected to its implementation since "the Negro majority in the existing District 3 has been changed to a white majority in the proposed District 3" in the face of "alternative means of redistricting which would probably not have this effect."[76]

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[72]Letter from David L. Norman, Asst. Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Landman Teller, former Attorney for the Warren County Board of Supervisors, Aug. 23, 1971.

[73]Letter from J. Stanley Pottinger, Asst. Attorney General, Civil Rights Div., U.S. Dep't of Justice, to John W. Prewitt, Attorney for the Warren County Board of Supervisors, Feb. 13, 1973.

[74]Facts taken from 1970 census data and the pleadings in Scott v. Burkes, Civil No. 4782 (S.D. Miss., filed Nov. 13, 1970).

[75]Scott v. Burkes, Civil No. 4782 (S.D. Miss., filed Nov. 13, 1970).

[76]Letter from Jerris Leonard, Asst. Attorney General, Civil Rights Div., U.S. Dep't of Justice, to J. Edward Smith, Attorney for the Leake County Board of Supervisors, Jan. 8, 1971. Subsequently, the district boundaries within the Town of Carthage were altered to meet the section 5 objection. Letter from Tolmach to Parker, *supra* note 36.

Hinds County. The Hinds County redistricting plan was a combination of cracking and stacking. Prior to redistricting, the heaviest black population concentration in the state, located within the capitol city of Jackson (59,773 black persons, 39.6 percent of Jackson's population), had already been divided among three of the five supervisors' districts. But the remaining two districts in the rural area had been predominantly black. Under the 1969 redistricting plan, undertaken pursuant to court order, Hinds County blacks lost both black majority districts under a plan which, through stacking, combined black concentrations with greater white concentrations. The plan also cracked the heavy black concentration in Jackson among all five districts which combined rural and urban areas (see Appendix D).[77] After Hinds County authorities were persuaded by the Department of Justice to submit the plan for section 5 clearance, the following objection was lodged:

> [W]e find that the district boundary lines are located within the City of Jackson in a manner that suggests a dilution of black voting strength will result from combining a number of black persons with a larger number of white persons in each of the five districts . . . such district lines within the City of Jackson were not based on any compelling governmental need and appear to be located fortuitously without any compelling governmental justification for their location. Our analysis persuades me that the specific location of the lines is not related to numeric population configurations or considerations for district compactness or regularity of shape.[78]

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[77]Facts taken from 1970 census data and the pleadings in Kirksey v. Hinds County Bd. of Supervisors, Civil No. 4939 (S.D. Miss., filed July 25, 1971).

[78]Letter from David L. Norman, Asst. Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Thomas Watkins, Attorney for the Hinds County Board of Supervisors, July 14, 1971. *See Hearings on the Enforcement of the Voting Rights Act Before the Civil Rights Oversight Subcom. of the House Comm. on the Judiciary,* 92d Cong., 1st Sess., ser. 8, at 334 (1971) [hereinafter cited as *Enforcement Hearings*].

In subsequent litigation filed by private parties, the district court held that the Hinds County supervisors' districts, as established by the objected-to-plan, failed to provide substantial population equality among the five districts on the basis of the 1970 census, and ordered the development of a new redistricting plan. Kirksey v. Hinds County Bd. of Supervisors, Civil No. 4939-N (S.D. Miss., Order of Dec. 26, 1972).

In addition, the Department of Justice has lodged section 5 objections to the county redistricting plans in Copiah, Marion, and Tate Counties, Mississippi. Letter from Tolmach to Parker, *supra* note 36. The Copiah County redistricting plan was objected to on the ground that:

> The available demographic information suggests that the boundary between proposed district 4 and proposed district 5 follows no natural or logical geographic pattern and will result in diminishing the percentage of Negro population in district 4 [majority black] while increasing it in district 5 [majority

The stated justification for the shape of the new districts in each of these cases was equalization of population among the districts,[79] but in several instances (because of defects in the house count technique used to arrive at population figures) 1970 census data showed that this equalization goal was not achieved. Also in each case, the private planning firm which devised the plan attempted to equalize not only population, but also miles of rural, county-maintained roads, area, and in some cases, assessed property valuation among the five districts.[80] Most counties in Mississippi operate on a district or "beat," system of county road and bridge administration, in which each supervisor is given a one-fifth share of county funds and is responsible for maintaining the roads, bridges, and culverts within his own district. The hypothesis is that equalizing county-maintained road mileage and area among the districts will result in equalizing road and bridge maintenance expenses, although this hypothesis has never been validated, and the result is to strengthen the beat system, which most Mississippi authorities consider to be an outmoded, inefficient, and wasteful form of county administration.[81] While the Department of Justice concluded in each case that there was no evidence of a racially discriminatory "purpose," it is clear that where blacks were concentrated in an urban area all attempts to equalize rural, county-maintained road mileage, area, and sometimes assessed valuation, inevitably resulted in the dispersement of black popu-

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white]. Our study has also presuaded me that there are alternative means of redistricting which would not have this effect.

Letter from Jerris Leonard, Asst. Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Julius L. Lotterhos, Jr., Attorney for the Copiah County Board of Supervisors, March 5, 1970. The Marion County objection was lodged "because of conflicts between population figures reported by the Bureau of the Census and those compiled by the county" which prevented the Department of Justice from determining the racial effects of the new districts. Letter from David L. Norman, Asst. Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Ernest R. Duff, Attorney for the Marion County Board of Supervisors, May 25, 1971. The Tate County redistricting was objected to because of unconstitutional population disparities between the districts, allowing a white majority district to be overrepresented and a black majority district to be underrepresented. Letter from Norman to Leon F. Hannaford, County Attorney for Tate County, Dec. 3, 1971.

[79]Yazoo County redistricting plan, *supra* note 69; Warren County redistricting plan, *supra* note 71; Leake County redistricting plan, *supra* note 74; Hinds County redistricting plan, *supra* note 77.

[80]*Id.*

[81]Miss. Gen. Legis. Investigating Comm., 1972 Report, vol. II, at 32; J. Corkran, A Comprehensive Analysis of Mississippi County Governmental Expenditures and Management of Road and Bridge Construction and Maintenance Operations, 1964-1969 (Mississippi State University, 1971); Mississippi Economic Council, County Unit Road Administration for Mississippi (1956).

lation concentrations among several districts.[82] But, equalizing these factors does not necessarily disperse black voting strength in exclusively rural counties where blacks are evenly distributed throughout the county.

IV. Can the Courts Remain Colorblind?

While to the impartial observer the racial gerrymanders illustrated in these section 5 objections may seem obvious and invidiously discriminatory in violation of federal voting rights guarantees, the federal courts, except in a few instances outside of Mississippi,[83] have failed strictly to apply traditional and anti-gerrymandering standards and have permitted cracked and stacked districts in the context of meeting *Reynolds* and *Avery* requirements.[84] To be sure, in *Gomillion v. Lightfoot*,[85] the Court disallowed gerrymandering of boundary lines "cloaked in the garb of the realignment of political subdivisions."[86] *Gomillion*, however was a pre-*Reynolds* case and the justification of obtaining equipopulous districts was not advanced (nor available).[87]

Until the Supreme Court directly addresses this question, the courts may continue to tolerate cracking and stacking carried out under the guise of reapportionment, thus diluting black voting majorities. In an

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[82]In Avery v. Midland County, 390 U.S. 474 (1968), the Court vacated a Texas court decision holding that concern for distribution of county-maintained roads, bridges, and property tax valuations justified disparities of population among county election districts, noting that *Reynolds* held that "bases other than population were not acceptable grounds for distinguishing among citizens when determining the size of districts. . . ." *Id.* at 484. The *Avery* decision might provide analogous support for a holding that concern for equalizing county roads, bridges, and property tax valuation may not justify diluting black voting strength.

[83]*See* cases cited notes 64 and 67 *supra.*

[84]*See* Tyler, *supra* note 63, at 400.

[85]364 U.S. 339 (1960).

[86]*Id.* at 345.

[87]The Supreme Court has not directly addressed racial gerrymandering of election district boundaries, except in *Gomillion* and Wright v. Rockefeller, 376 U.S. 52 (1964). However, in Burns v. Richardson, 384 U.S. 73, 88 (1966) and Fortson v. Dorsey, 379 U.S. 433, 439 (1965), the Court in dicta indicated that multi-member districts would be unconstitutional if it could be shown that "designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *But see* Whitcomb v. Chavis, 403 U.S. 124 (1971), *rev'g* Chavis v. Whitcomb, 305 F. Supp. 1364 (S.D. Ind. 1969), which held multi-member districts unconstitutional for diluting ghetto voting strength, where it was conceded that the state's preference for multi-member legislative districts was not racially motivated and the proof showed that the defeat of black candidates was a mere function of defeat of Democratic party candidates at the polls.

early Mississippi congressional redistricting case, *Connor v. Johnson*,[88] a three-judge district court sustained a plan enacted by the Mississippi Legislature which divided the state's Second Congressional District—containing 17 majority black counties—among three new districts, thereby precluding the election of a black representative from the state with the nation's highest percentage of blacks.[89] The district court appeared to negate any intensive examination of the racial effect of the plan when it held that "one factor, and only one, may be taken into account in apportioning and establishing Congressional districts among the people of a state *and that factor is population.*"[90] The decision was affirmed, per curiam, without oral argument, by the Supreme Court.[91]

In a recent county redistricting case from Mississippi, *Howard v. Adams County Board of Supervisors*,[92] the Fifth Circuit gave short shrift to plaintiffs' claims that a realignment of supervisors' districts, ostensibly undertaken to cure malapportionment but resulting in a span of 22.15 percentage points of variance under the 1970 census data, and which cracked Adams County's black majority district four among four of the five new districts, was invidiously discriminatory. Prior to redistricting, district four (77.6 percent black) had been sufficiently populous to be subdivided into two compact, black majority districts;[93] but the board

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[88]279 F. Supp. 619 (S.D. Miss. 1966) (three-judge court), *aff'd per curiam*, 386 U.S. 483 (1967).

[89]*See* POLITICAL PARTICIPATION, *supra* note 9, at 30-35.

[90]279 F. Supp. at 623.

[91]386 U.S. 483 (1967) (only Justice Douglas would have noted probable jurisdiction and calendared the case for plenary consideration).

[92]453 F.2d 455 (5th Cir. 1972), *cert. denied*, 407 U.S. 925 (1972).

[93]Plaintiffs contended that the five pre-existing districts could have been combined and sub-divided to arrive at five equi-populous districts following pre-existing district boundary lines:

Old District	Population 1970 Census	Population New Dist.	Pop. Under or Over Norm	Percent Variance	Percent Black
4	15,074	7,537 (two new districts)	+ 78	+1.05	75.3
1	13,590	7,537 (two new districts)	−127	−1.70	31.8
2	1,073				
	14,663				
3	1,492	7,556 (one new district)	+ 97	+1.30	24.4
5	6,064				
	7,556				

Brief for Appellants at 43, Howard v. Adams County Bd. of Supervisors, 453 F.2d 455 (5th Cir. 1972).

of supervisors' plan, to equalize county-maintained road mileage and area, had fragmented the district and, by combining rural (predominantly white) and urban (predominantly black) territory in each new district, had deprived the county's black voters of a second black majority district,[94] although it retained one black majority (66.8 percent black) under the new district four scheme (see Appendix E). Plaintiffs' claim that this dispersal of black voting strength was unnecessary and unconstitutional was rejected with the conclusion that the record was "bare" of any evidence of racial motivation,[95] and with the comment that "[i]nevitably, people of different races, national origins, and contrasting tenets will be shifted under reapportionment plans to districts in which they may no longer be in the clear majority."[96]

The decision in *Howard* represents a step backward and seriously undermines federal constitutional and statutory voting rights guarantees. To the extent that it fails to apply principles established in cases involving similar claims, discussed herein, the decision should not be followed in future cases. First, the court failed to recognize the principle, implicit in the at-large voting cases, that states and political subdivisions with a prior history of racial discrimination in voting are under an affirmative obligation in adopting new election procedures to insure that those new procedures do not have the effect of diluting or minimizing black voting strength. The standard is not unlike that recently applied by the Supreme Court in school desegregation cases, whereby the reorganization of school districts "must be judged according to whether it hinders or

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[94]The second highest black district was District Three, 51 percent white, 49 percent black. 453 F.2d at 457.

[95]*Id.* at 458. However, the court noted that proof of racial motivation was no longer necessary to establish unconstitutional discrimination in redistricting, if the effect was racially discriminatory. *Id.* at 457-58.

[96]*Id.* at 459. The court rejected what it characterized as:

> plaintiffs notion that they are constitutionally entitled to have old District Four divided into two predominantly black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts.

Id. at 458, *citing,* Whitcomb v. Chavis, 403 U.S. 124, 144 (1971). The record does not reveal that plaintiffs expressly asked for benign districting, and this conclusion could well be applied in all racial gerrymandering cases to turn black voters' claims for racial equality into arguments for a racial preference, which could then be rejected on that ground.

The district court in *Howard* had already rejected the challenged redistricting plan for failure to meet standards of population equality, and on remand from the Fifth Circuit the defendants merely adjusted the lines in Natchez to provide more equal districts. The case is now back in the Fifth Circuit on plaintiffs' contention that the revised plan constitutes an even greater racial gerrymander. Howard v. Adams County Bd. of Supervisors, No. 72-2596 (5th Cir., filed June 20, 1972).

furthers the process of school desegregation."[97] Redistricting, therefore, must be judged according to whether it hinders or furthers the opportunities of newly-enfranchised black voters to elect representatives of their choice.

The practical effect of this standard's application is to require redistricting authorities to pursue the least discriminatory alternative in redistricting. If, in *Howard*, it was possible to redistrict the county to provide two districts in which newly-enfranchised black voters could elect representatives of their choice and still meet one-man, one-vote requirements, as the plaintiffs contended, then the court should have required the defendants to pursue that alternative, rather than allowing a plan which cancels out a second black majority district. In short, it is not true that "[i]nevitably, people of different races, national origins, and contrasting tenets will be shifted . . . to districts in which they may no longer be in the clear majority."[98] In most cases there are a number of redistricting alternatives which would equally satisfy equal population standards, some more discriminatory than others. Under these circumstances the courts should require the adoption of the least discriminatory alternative.[99]

Second, the court erred in permitting the defendants to justify their dispersal of old district four black voting strength on the basis of what it termed the "legitimate planning objectives"[100] of equalizing county-maintained road mileage and land area for purposes of county district administration. The Justice Department objections under section 5 of the Voting Rights Act of 1965 have shown that when there is a heavy concentration of black population in the urban center of a county, equalizing county-maintained road mileage and land area (which requires the rural portions of the county to be equally divided among the new districts) dictates that the urban center be fragmented among the districts to achieve population equality, with the inevitable effect of cracking black population concentrations and dispersing them among several districts.[101] If the use of these planning criteria did result in a dispersal of black voting strength in Adams County, as the court seemed to recog-

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[97]Wright v. Council of City of Emporia, 407 U.S. 451, 460 (1972).

[98]Howard v. Adams County Bd. of Supervisors, 453 F.2d 455, 459 (5th Cir. 1972).

[99]*See, e.g.*, Sims v. Amos, 336 F. Supp. 924 (M.D. Ala. 1972); Bussie v. Governor of Louisiana, 333 F. Supp. 452 (E.D. La. 1971) (master's plan accepted, defendants' plan rejected); Troxler v. St. John the Baptist Parish Police Jury, 331 F. Supp. 222 (E.D. La. 1971) (defendants' plan rejected, plaintiffs' plan accepted).

[100]453 F.2d at 456.

[101]*See* text at notes 79-82 *supra*.

nize, then the court permitted federal constitutional and statutory voting rights guarantees to be subverted by an administrative planning decision of the board of supervisors, which apparently was without precedent in Adams County[102] and certainly without specific statutory authority.[103]

The *Howard* decision thus seems to permit unconstitutional racial gerrymandering and dispersal of black voting strength when cloaked in the garb of equalizing county-maintained road mileage and land area. All other things being equal in racially neutral circumstances, permitting non-population related criteria to influence line-drawing decisions should not violate constitutional guarantees; but, applying administrative criteria unrelated to the constitutional requirement of equalizing population among the districts does become constitutionally intolerable when it has the effect of fragmenting and carving up black population concentrations and produces distorted districts.[104]

The decisions in these cases are not untypical and seem to be part of a general pattern of unresponsiveness by the courts to claims of racial gerrymandering.[105] In each case all the objective criteria for detecting

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[102]Prior to the 1970 redistricting, the pre-existing supervisors' districts contained great disparities of county-maintained road mileage and land area. Adams County Redistricting Plan, p. 6, on file in Howard v. Adams County Bd. of Supervisors, 453 F.2d 455 (5th Cir. 1972).

[103]The Mississippi statute providing for county redistricting, MISS. CODE ANN. § 2870 (1956), provides no specific authorization for equalizing county-maintained road mileage or land area in county redistricting. *See* relevant text accompanying note 16 *supra*.

[104]Deference to the concerns of local government administration in the reapportionment cases has justified departures from strict equality of population among the districts, *e.g.*, Mahan v. Howell, 93 S. Ct. 979 (1973) (allowing a span of 16.4 percent to preserve the integrity of political subdivision lines); Abate v. Mundt, 403 U.S. 182 (1971) (approving span of 11.9 percent), largely because the language of the 14th amendment is not specific on this point, and therefore substantial leeway in the enforcement of the one-man, one-vote requirement seems tolerable: "Mathematical exactness or precision is hardly a workable constitutional requirement." Reynolds v. Sims, 377 U.S. 533, 577 (1964). But the flexibility allowed in the reapportionment cases should not permit a similar flexibility in the enforcement of 15th amendment guarantees. The requirements of the 15th amendment are specific, unequivocal, and inflexible: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960).

[105]In the Virginia legislative reapportionment case, Mann v. Davis, 245 F. Supp. 241 (E.D. Va. 1965) (three-judge court), *aff'd sub nom.* Burnette v. Davis, 382 U.S. 42 (1965), the Court summarily affirmed a district court decision holding that stacking black concentrations with greater white concentrations in combining the City of Richmond and adjoining Henrico County in a multi-member district for election

racial gerrymanders had been met: (1) the new boundary lines abandoned pre-existing district boundaries; (2) the shapes of the new districts contained narrow corridors, were overly elongated, and uncompact; (3) black voting strength was fragmented and diluted; and (4) there was no evidence that there were no alternative plans which could have satisfied one-man, one-vote standards without dispersing concentrations of black voting strength.[106] In Mississippi, with its extensive past history of racial exclusion of blacks from equal opportunities for political participation, new districts with such characteristics should be presumptively unconstitutional, even in the absence of direct evidence of racial motivation. Further, it appears that the courts in these cases failed to apply even the most elemental anti-dilution standards enunciated by the Department of Justice in the section 5 objections, although in the *Howard* case the new plan had been submitted and no objection was lodged.[107]

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of members of the state legislature was not unconstiutional given the state's history of multi-member districts.

More recently, the Court summarily affirmed per curiam a district court decision in the Oklahoma legislative reapportionment case which rejected claims that the legislature's plan for state senate districts cracked black population concentrations in Tulsa County on the ground that the plan achieved almost perfect equality of population whereas the plaintiffs' proposed alternative did not. Ferrell v. Oklahoma *ex rel.* Hall, 339 F. Supp. 73 (W.D. Okla. 1972) (three-judge court), *aff'd per curiam*, 406 U.S. 939 (1972).

In Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972) (three-judge court), the court voided multi-member legislative districts in Bexar and Dallas Counties, but rejected (2-1) claims that the senatorial districts in Harris County (Houston), which cracked the center city and combined urban black concentrations with outlying white concentrations in four white majority districts (*id.* at 744-49) (dissenting opinion), were gerrymandered, holding that the Constitution required proof that "the effects are indeed substantial, if not egregious", *id.* at 735, without further definition of those terms.

[106]In numerous cases, the presence of these factors have been held probative of racial gerrymandering. *See* Edwards, *The Gerrymander and "One Man, One Vote,"* 46 N.Y.U.L. Rev. 879 (1971).

[107]In response to an inquiry from Senators Philip A. Hart, Edward M. Kennedy, Birch Bayh, and John V. Tuney as to why the Department of Justice did not object to the Adams County redistricting, David L. Norman, then Acting Assistant Attorney General in charge of the Civil Rights Division responded that available information indicated that "its purpose was to remedy existing disproportionate representation among the several beats in the County in conformity with the one-person, one-vote requirement of the Fourteenth Amendment" and that "[u]nder the redistricting plan, a substantial black majority of over 68% was maintained in Beat 4." *Enforcement Hearings, supra* note 78, at 316. The Justice Department's failure to object appears inconsistent with the section 5 objections to redistricting plans in Yazoo and Warren Counties, where although the redistricting was purportedly undertaken to cure malapportionment and resulted in retaining some black majority districts, there was, nevertheless, a fragmentation of urban black population concentrations.

If this trend continues, and the courts continue to fail to apply the appropriate anti-gerrymandering standards enunciated in the Attorney General's section 5 objections, serious conflicts will be created between the administrative and judicial enforcement of voting rights guarantees against racial discrimination, and political subdivisions will be increasingly encouraged to avoid section 5 submission of new boundary changes in redistricting suits[108] by going to courts where they can expect the anti-gerrymandering standards to be less demanding.

The adverse precedental effect of these cases may be offset by the Supreme Court's recent decision in *Taylor v. McKeithen*,[109] a Louisiana legislative reapportionment case. There a special court-appointed master devised a legislative reapportionment plan in the City of New Orleans, giving blacks two registered majority senatorial districts by splitting traditional ward and precinct lines. The incumbent state senators, who under the master's plan were pitted against each other, proposed an alternative plan which followed ward lines but precluded black registered majorities in any district (although one district had a black population majority). The district court, in rejecting the senators' plan on the grounds that it appeared to be designed to protect the incumbents in office and also because it cracked black majorities, stated, "while the Senators' plan probably would meet the one man, one vote standard . . . it would . . . operate to diversify the Negro voting population throughout the four districts and thus significantly dilute their vote."[110] The court of appeals, without opinion, simply substituted the incumbent senators' proposed districts for the district court's approved districts. The Supreme Court in a brief per curiam opinion, noting the district court's conclusion that the senators' cracked districts were racially discriminatory, vacated the judgment of the court of appeals and remanded for further proceedings "[b]ecause this record does not fully inform us of the precise nature of the litigation and because we have not had the benefit of the insight of the Court of Appeals."[111] Implicit in this decision is the recognition by the Supreme Court, for the first time, of the racially discriminatory effect of cracked districts in the context of re-

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[108]The Supreme Court itself opened the door to circumvention of the section 5 submission requirements in the latest stage of the Mississippi legislative reapportionment case, when it said, in ruling on a motion for stay pending appeal, "[a] decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act. . . ." Conner v. Johnson, 402 U.S. 690, 691 (1971).

[109]407 U.S. 191 (1972), *vacating and remanding* Bussie v. McKeithen, 457 F.2d 796 (5th Cir. 1971), *modifying and aff'g* Bussie v. Governor of Louisiana, 333 F. Supp. 452 (E.D. La. 1971).

[110]333 F. Supp. at 457.

[111]407 U.S. at 191.

apportionment litigation, although precise definition of the circumstances in which cracked districts are unconstitutional must await further litigation.

The congressional redistricting decision in *Connor* and the county redistricting decision in *Howard* also should be compared with the recent decision in *Moore v. Leflore County Board of Election Commissioners.*[112] In *Moore,* after the district court struck down the at-large election of supervisors,[113] the defendants submitted to the court an alternative redistricting plan. Prior to redistricting, blacks constituted a population majority ranging from 69 percent to 78 percent in four of the five supervisors' districts, in a county which is 58 percent black.[114] The proposed plan equalized population among the five districts but substantially reduced the black population preponderance in each district, and dispersed the black population concentration in southeast Greenwood (containing 44.2 percent of the county's black population) among four of the five new districts.[115] The district court held the plan constitutionally unacceptable, finding that "both the purpose and effect of the board's plan was to divide the black population and dilute the black vote in Leflore County."[116]

The proposed redistricting in *Moore* was clearly unconstitutional because the board admitted utilizing an express racial criterion — "Mr. Kellum [president of the board] frankly testified on the witness stand that his intent was to bring into each of the new districts the same racial ratio, *i.e.,* 58% black to 42% white, as existed for the county as a whole. . . ."[117] The question which must be answered in future cases is whether a redistricting plan which achieves the same effect, *i.e.,* dispersal and fragmentation of black voting strength, is unconstitutional if the defendants do not admit using racial criteria, but rather justify the location of the new boundary lines on the use of facially non-racial criteria unrelated to achieving population equality, such as equalizing county-maintained road mileage, or area, or assessed property valuation

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[112]Civil No. GC 71-84-K (N.D. Miss. Dec. 20, 1972).

[113]Moore v. Leflore County Bd. of Election Comm'rs, 351 F. Supp. 848 (N.D. Miss. 1971).

[114]Civil No. GC 71-84-K, at 6 (N.D. Miss. Dec. 20, 1972).

[115]*Id.* at 2-3.

[116]*Id.* at 10. Unfortunately, the court also endorsed equalizing county-maintained road mileage and area, although the president of the board of supervisors testified that this was not necessary to county government. Hearing transcript at 209 (Oct. 18, 1972). Thus, the court inadvertantly may have permitted the board to accomplish by indirect means what it prohibited the board from accomplishing by the express use of racial criteria. *See* note 82 *supra.*

[117]*Id.* at 3.

in each of the new districts. Supreme Court dicta in prior cases[118] and the recent *Taylor* decision suggest that a strong racially discriminatory effect alone is sufficient to vitiate such a redistricting plan.[119]

To date the Supreme Court and the courts of appeals have failed to articulate adequately the sorely needed strict standards by which cases of racial gerrymandering are to be judged. The cases involving at-large elections provide a guide for whether the result reached by the Supreme Court in *Whitcomb* was correct. At least it should be clear that in Southern States, with a prior history of racial discrimination in voting, public officials are under an affirmative obligation to draw district lines which do not minimize or cancel out new black voting strength. The Department of Justice's section 5 objections to Mississippi redistricting plans, while inadequate in some instances, nevertheless provide a starting point for the development of such standards. Where new district lines violate the traditional anti-gerrymandering standards of compactness, contiguity, and adherence to pre-existing political subdivision boundaries, or where the new lines have the effect of cracking or stacking concentrations of black voting strength, there is a strong case for attaching a presumption of unconstitutionality to such plans and for placing the heavy burden of justifying the new district lines on state or county authorities. Indeed, it is arguable that such was the intent of Congress in requiring a prior declaration of constitutionality of new election procedures in enacting section 5 of the Voting Rights Act of 1965. The Department of Justice, in its new section 5 enforcement regulations, also places the burden on state authorities to prove that new election procedures are not racially discriminatory.[120] Where the new district lines dilute black voting strength, as in cases of cracked or stacked districts, the redistricting authority should be required to show, as in other cases of franchise abridgment, that the new boundary lines are necessary to effectuate a compelling state interest, and that no less discriminatory alternatives are available.[121]

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[118]Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965).

[119]In Sellers v. Trussell, 253 F. Supp. 915 (M.D. Ala. 1966), a three-judge district court held that although there were "legitimate purposes" for a special legislative act extending the terms of office for incumbent county commissioners, and no evidence of racially discriminatory motives, nevertheless the act was unconstitutional because of its "readily apparent discriminatory effect. . . ." *Id.* at 917.

[120]28 C.F.R. 51.19 (1971), procedures for the administration of section 5 of the Voting Rights Act of 1965.

[121]In Kramer v. Union Free School Dist., 395 U.S. 621 (1969), the Court, in striking down property tax and parenthood restrictions on the right to vote in school district elections, required the state to shoulder the burden of showing that

The development of strict anti-dilution standards should not be confused with benign districting, or with requiring a racial preference. In *Howard v. Adams County Board of Supervisors*[122] the Fifth Circuit rejected plaintiffs' alleged claims "that they are constitutionally entitled to have old District Four divided into two predominantly black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts."[123] In Adams County blacks constituted 47.9 percent of the total population, and thus had the voting strength to elect at least two blacks to the board of supervisors, while the challenged redistricting plan provided only one black majority district. If, as the recent legal commentary[124] and the cases[125] seem to hold, the essence of racial gerrymandering is racial malrepresentation, then under these circumstances a redistricting plan resulting in only one black majority district should be presumptively unconstitutional, and the redistricting authority should be obliged to prove the unavailability of alternative plans providing equi-populous districts without this substantial dilution of black voting strength. Otherwise, the conclusion of the court of appeals is tantamount to a holding that claims of racial gerrymandering, or dilutions of black voting strength, are non-justiciable, and counties in Southern States will be free to gerrymander black voting strength so long as they provide one token black majority district, regardless of the potential for greater black representation.

> the exclusions are necessary to promote a compelling state interest . . . . [W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable.

Id. at 627-28. In most cases involving claims of racial gerrymandering, the courts have failed to apply this "strict scrutiny" standard, and the claims have been rejected because the plaintiffs have failed to meet their burden of proof which, in most cases, is not defined. *See, e.g.,* Howard v. Adams County Bd. of Supervisors, 453 F.2d 455, 458 (5th Cir. 1972). In requiring the state to show that the exclusions, or redistricting, are necessary to promote a compelling state interest, there should be no distinction between cases in which the franchise is denied, as in *Kramer,* or where it merely is diluted, as in *Howard,* since "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition in casting a ballot." Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969); Reynolds v. Sims, 377 U.S. 533, 555 (1964).

[122]453 F.2d 455 (5th Cir. 1972), *cert. denied,* 407 U.S. 925 (1972).

[123]*Id.* at 458.

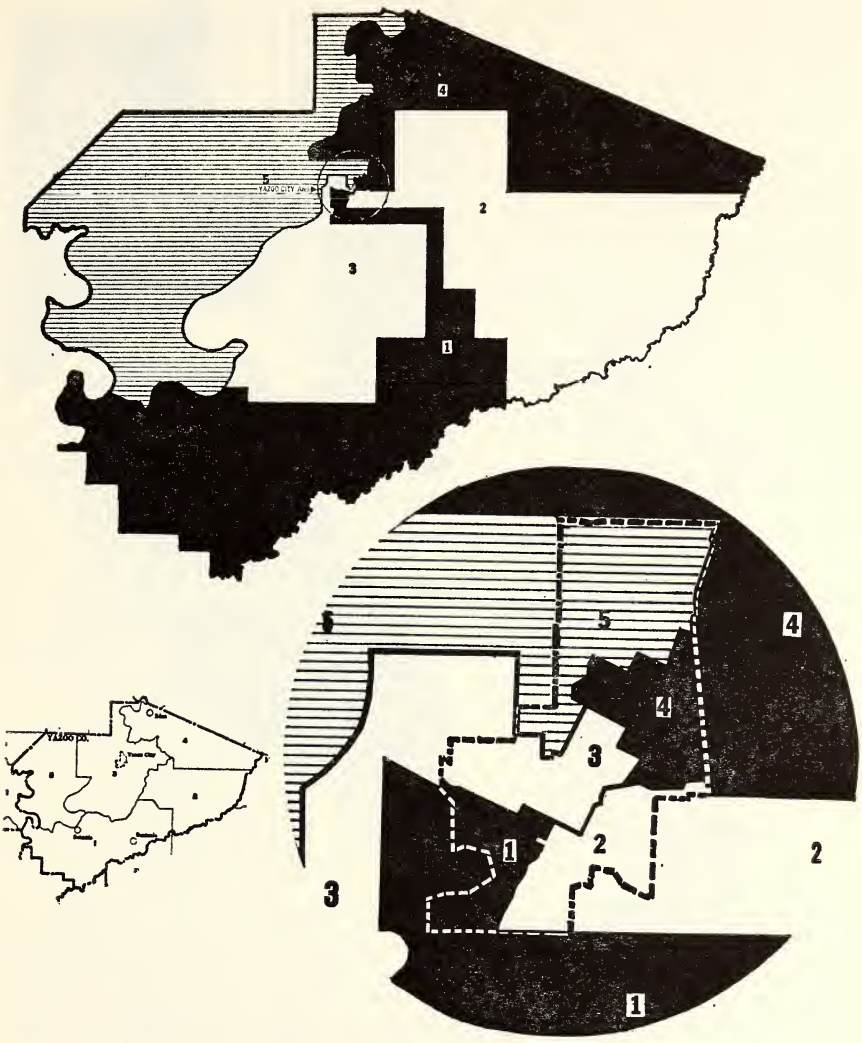
[124]*See* note 62 *supra.*

[125]Bussie v. Governor of Louisiana, 333 F. Supp. 452 (E.D. La. 1971); Smith v. Paris, 257 F. Supp. 901, 904 (M.D. Ala. 1966); Sims v. Baggett, 247 F. Supp. 96, 109 (M.D. Ala. 1965).

V. Conclusion

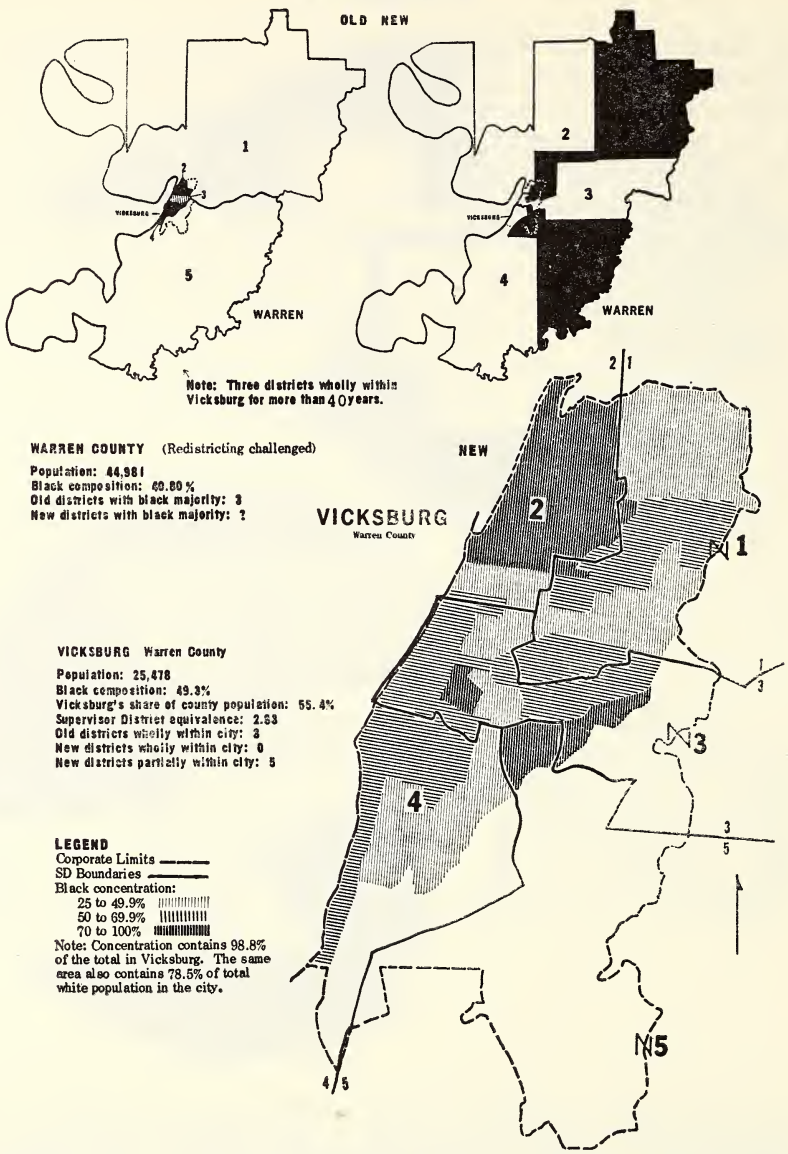
Although black citizens in Mississippi under the Voting Rights Act of 1965 now have the right to register and vote freely, without discrimination, the newly gained franchise in many instances has been rendered meaningless by racial gerrymandering under the guise of county reapportionment to meet *Reynolds* standards. The gerrymandering has proceeded by two stages: first, by abandoning supervisors' district boundaries entirely and electing members of the county board of supervisors on an at-large, countywide basis, in some instances diluting the voting strength of blacks who held district, but not countywide, voting majorities; and second, by carefully redrawing district boundaries using additional criteria unrelated to population equality, such as equalizing county-maintained road mileage, area, and assessed valuation among the districts, which results in districts with distorted boundary lines by cracking concentrations of black voting strength, or by stacking greater white population majorities onto lesser black population concentrations to disperse and dilute black voting strength. In significant instances, such racial gerrymandering of boundary lines has been blocked by objections of the Department of Justice under section 5 of the Voting Rights Act of 1965; but other instances, displaying the same characteristics as the objected-to plans, have been approved by the courts, both before and after the passage of the Voting Rights Act. These section 5 objections show that the courts generally have been remiss in failing to articulate strict and well-defined standards for judging claims of racial gerrymandering. Unless the Supreme Court, and the courts of appeals, become more sensitive to the intricacies of racial gerrymandering, redistricting in Mississippi, and in other states with substantial black concentrations, may well become an instrument for defeating the *Reynolds* goal of providing fairer and more equal democratic representation.

APPENDIX A



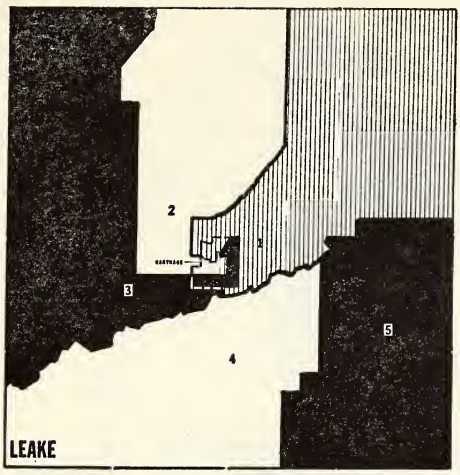
Yazoo County "cracked" districts. Small map on left (census map) shows supervisors' district boundaries in Yazoo County, Mississippi, prior to redistricting. Under the redistricting plan, District 3 was fragmented among all five districts (top map, districts shaded to show shape of boundaries) and the black concentration in majority black Yazoo City, the county seat (map on right) was unnecessarily dispersed among all five new districts leading to an objection to the redistricting plan from the Department of Justice. Unless otherwise indicated, all maps used herein drawn by Henry J. Kirksey, Jackson, Mississippi.

APPENDIX B



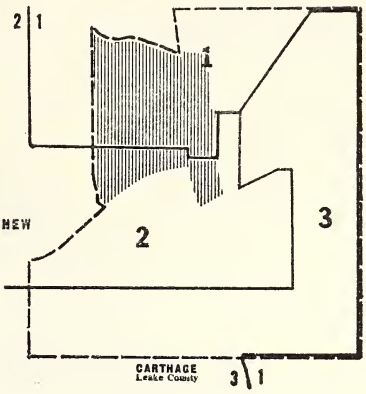
Warren County "cracked" districts. Prior to redistricting three majority black supervisors' districts were contained entirely within the county seat of Vicksburg (top left), but the new redistricting plan combined rural and urban areas in each new district within boundary lines which were decidedly uncompact (top right, districts shaded to show shape of boundaries), and which dispersed among all five districts the black population concentration within Vicksburg (bottom right, new district lines superimposed on census enumeration districts shades for racial percentages).

APPENDIX C



NEW

LEGEND
Corporate Limits
SD Boundaries
Black concentration:
61.1%



LEAKE COUNTY (Redistricting challenged)

Population: 17,085
Black composition: 35.6%
Old districts with black majority: 1
New districts with black majority: 0

PRIOR DISTRICT BOUNDARIES
(census map)

CARTHAGE Leake County

Population: 3,031
Black composition: 21.9%
Carthage share of county population: 17.7%
Supervisor District equivalence: .8
Districts wholly within city: 0
Districts partially within city: 3
Districts dividing black concentration: 2

Leake County "stacked" districts. Prior to redistricting, District 3 (shown on map at bottom left) had been majority black. Under the new redistricting plan, the new District 3 boundary was curved into the Town of Carthage (top left, districts shaded to show shape of boundaries) and hooked around the black concentration in Carthage to submerge the rural black population formerly in old District 3 into a greater urban white concentration in Carthage contained in a boundary line which formed a perfect number "1" (map on right, shading indicates majority black Census enumeration district within Carthage).

APPENDIX D

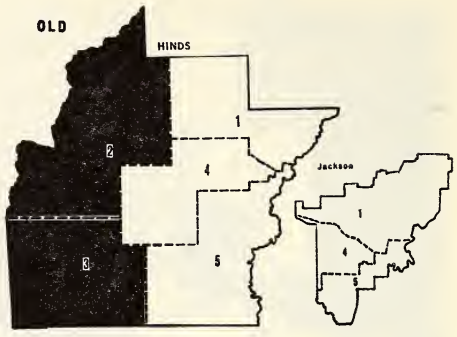
HINDS COUNTY (Before 1969 redistricting)

1969 Census

Population: 187,045
Black composition: 40.0%
Jackson per cent of population: 77.2
Districts with black majority: 2

1970 Census

Population: 214,973
Black composition: 39.1
Jackson per cent of Population: 71.1%
Districts with black majority: 2

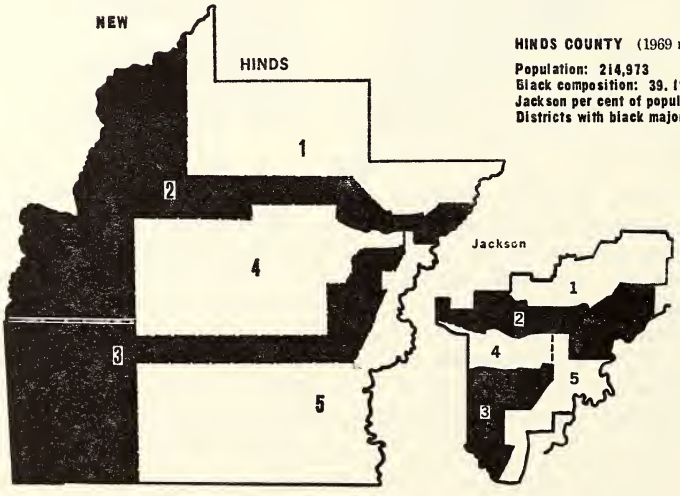


MAP A

The table below shows new district population as counted by planners, estimated by plaintiffs and recomputed to new district lines by the Census Bureau:

SD	Planners	Plaintiffs	Census Bureau
1	43,236	51,200	50,962
2	43,324	38,800	38,913
3	42,921	48,800	48,852
4	42,777	43,300	43,110
5	43,192	32,000	33,136

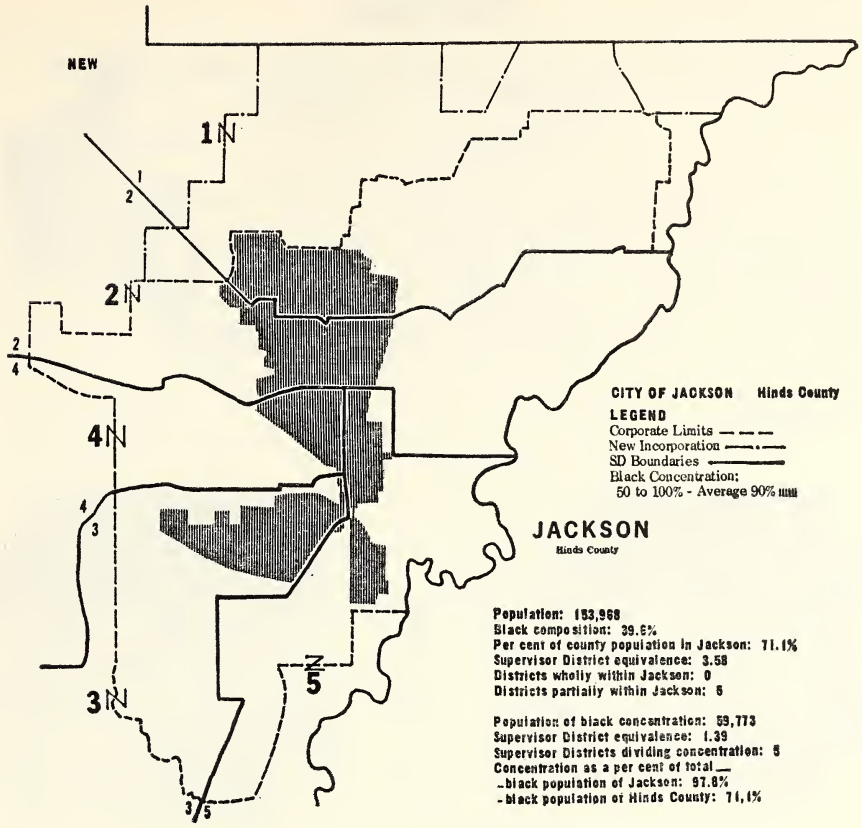
Planners' criteria for redistricting:
1. Equal Population 2. Equal county road milage
3. Equal assessed property value



HINDS COUNTY (1969 redistricting challenged)

Population: 214,973
Black composition: 39.1%
Jackson per cent of population: 71.1%
Districts with black majority: 0

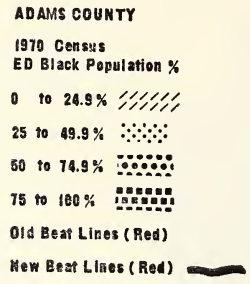
MAP B **MAP C**

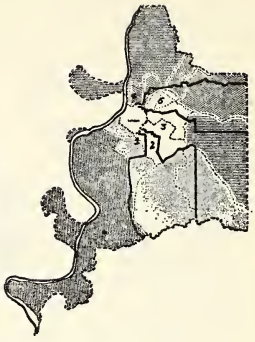


MAP D

Hinds County "stacked" and "cracked" districts. Before redistricting, Hinds County had two black majority districts (Districts 2 and 3) in the rural area of the county, and only three districts penetrated the City of Jackson (Map A). The new redistricting plan eliminated the rural, majority black districts and brought all five districts into the City of Jackson (Map C, City of Jackson, and Map B, Hinds County) to submerge the rural black concentration into greater urban white concentrations and to disperse the urban black concentration (containing 60,000 black persons) among all five districts (Map D, majority black enumeration districts shaded).

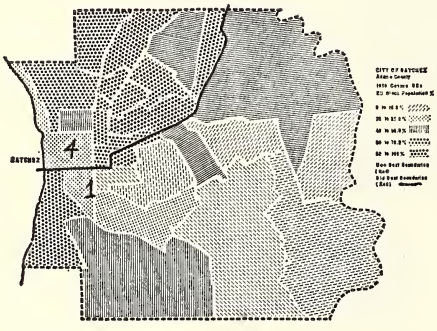
APPENDIX E

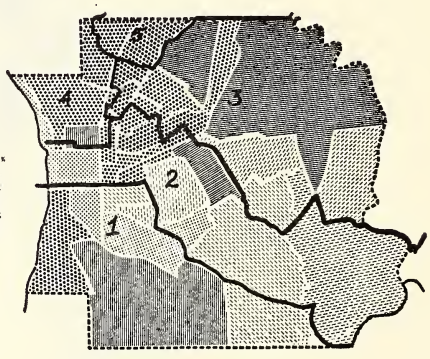




MAP A

MAP B





MAP C

MAP D

Adams County "cracked" districts. Before redistricting, only two districts penetrated the City of Natchez, and the district boundaries generally were compact (Maps A and C). The challenged redistricting plan combined rural and urban areas in each new district, resulting in district boundaries with irregular shapes and many sides (Map B), and divided the black population concentration formerly within old District 4 among four of the five new districts (Map D). In the bottom two maps census enumeration districts are shaded for racial percentage.

COMMENTS

INSTALLMENT SALES OF REAL ESTATE UNDER THE INTERNAL REVENUE CODE

I. Introduction

Each year practitioners are involved in a substantial number of deferred payment sales or dispositions of real property, ranging from the sale of a personal residence to the sale of large tracts of land for commercial development. Income tax consequences arising from deferred sales may prove to be a trap for the unwary vendor, since any gain realized on such sale often creates an immediate tax liability in excess of the cash received in the year of sale. Deferred payment sales present special income tax problems to vendors since only a small portion of the selling price is paid in the year of sale while the larger portion rests in the buyer's unrealized promise to pay, secured by a mortgage or deed of trust. The installment sales provisions of the Internal Revenue Code[1] are relief provisions and exceptions to the general rule as to the year for reporting income.[2] The installment sales provisions offer the vendor an elective method of reporting gain realized from the sale or disposition of certain property in those years in which the installment payments are actually received. This advantage of spreading the seller's income tax liability over future years assists in providing a market for property which would otherwise be nonexistent were the seller to limit, because of tax consequences, the sale to cash purchasers. The installment method is also advantageous in that it avoids the affect of the progressive tax rates, thereby possibly reducing the overall tax on the sale. Furthermore, use of the installment method will enable the seller to utilize deferred tax dollars to generate additional income or otherwise use the deferred tax dollars in his business.

This comment will examine the technical requirements of the installment provisions with respect to sales of real property and attempt to

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[1] Int. Rev. Code of 1954, § 453.

[2] 2 J. Mertens, Law of Federal Income Taxation § 15.01 (Rev. Ed. 1967). The installment method of reporting income was first recognized by the income tax regulations, Treas. Reg. 33 (revised), art. 116-17 (1918). The Board of Tax Appeals in B.B. Todd, Inc., 1 B.T.A. 762 (1925), invalidated these regulations on the grounds that the installment method was not recognized by statute and did not accurately reflect the income. The Revenue Act of 1926 gave statutory approval to the installment sales provision in substantially the same form as it is today. Revenue Act of 1926, ch. 27, § 212 (d), 44 Stat. 23. *See generally* 2 Mertens, *supra* § 15.02.

survey various problem areas and pitfalls associated with this method of reporting income.

II. Deferred Payment Sales Not Under the Installment Method

A. Cash Basis Taxpayers

Prior to analyzing the statutory requirements of the installment method of reporting income, it is appropriate to examine the tax treatment of a sale or disposition under an installment arrangement which does not qualify for the installment method; or, if qualified, is not elected to be so treated. The general rule is that the gain from the sale or disposition of property is the excess of the amount realized over the adjusted basis of the property.[3] Loss from such sale or disposition is the excess of such adjusted basis over the amount realized.[4] The computation of the amount realized[5] in deferred payment sales includes the fair market value of any obligations of the vendee received by the vendor, as well as any assumption of a mortgage or other indebtedness by the vendee.[6] For example, a calendar year taxpayer sells real property having an adjusted basis of $52,000 for a selling price of $100,000 payable as follows: cash downpayment, $20,000; buyer's assumption of existing mortgage, $20,000; and notes (evidence of indebtedness of vendee), $60,000 (having a fair market value of $60,000) payable in yearly installments of $10,000 over the next 6 years. The total amount realized is $100,000, and the taxpayer would recognize an immediate gain of $48,000 if the installment method is unavailable or not elected in the year of sale.

Deferred payment obligations of the purchaser which have a fair market value[7] less than their face amount will result in a correspondingly lesser amount of gain to be recognized by the seller in the year of sale. Nevertheless, the seller may be forced to recognize ordinary discount income in subsequent years if the obligations are liquidated at their face value. In *Shafpa Realty Corp.*,[8] the taxpayer, in receiving part payments

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[3] Int. Rev. Code of 1954, § 1001 (a).

[4] *Id.*

[5] "Amount realized" is defined as the sum of any money received plus the fair market value of the property (other than money) received. *Id.* § 1001 (b).

[6] Crane v. Commissioner, 331 U.S. 1 (1946); Smith v. Commissioner, 324 F.2d 725 (9th Cir. 1964).

[7] For a discussion of the valuation of deferred payment obligations, *see* Note, *Taxation of Deferred Payment Sales of Realty and Casual Sales of Personalty*, 10 Utah L. Rev. 195, 203-20 (1966).

[8] 8 B.T.A. 283 (1927).

on a mortgage note acquired at a 20 percent discount from its face value, contended that such payments could not give rise to ordinary income until his basis in the obligation had first been recovered. The Board of Tax Appeals upheld the Commissioner's contention that each payment made was a payment on the face of the mortgage, 80 percent of which represented a return on the principal and 20 percent a realization of discount income.[9]

If the consideration received by the vendor has no ascertainable fair market value, the "cost recovery" method may be used to report the gain or loss arising from such transaction.[10] In the leading case of *Burnet v. Logan*,[11] the taxpayer sold shares of mining stock for which she received cash and a stipulated sum per ton of ore actually mined. The taxpayer contended that since the contract of sale lacked a definite output requirement, no gain should be recognized until her cost had first been recovered. The Supreme Court found the fair market value of the contract for future payments to be unascertainable and held that the taxpayer was entitled to recover her basis prior to realizing any income from the transaction. Accordingly, when the "cost recovery" method is used, the transaction will be regarded as "open," and the "sale or exchange" element of a capital gain[12] will be deemed present throughout the duration of the subsequent installment payments.[13] The current regulations[14] have embodied the doctrine of *Burnet v. Logan* but fail to establish criteria to aid in the determination of the lack of a fair market value. It is stated that "[o]nly in rare and extraordinary cases does property have no fair market value."[15]

In *Ravlin Corp.*,[16] the taxpayer, a Florida real estate developer, succeeded in convincing the Board of Tax Appeals that outstanding deferred payments on contracts for the sale of lots had no fair market value where the paper was not acceptable as collateral for a loan nor could it otherwise be realized on. In *Joliet-Norfolk Farm Corp.*,[17] it was

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[9]*See also* Walter H. Potter, 44 T.C. 159 (1965).

[10]*See* Treas. Reg. § 1.453-6(a) (2) (1958).

[11]283 U.S. 404 (1931).

[12]In order to obtain capital gain treatment, there must have been a "sale or exchange" of a capital asset. *See* INT. REV. CODE OF 1954, § 1222. "The term 'long-term capital gain' means gain from the sale or exchange of a capital asset held for more than 6 months . . . ." *Id.* § 1222(3).

[13]Note that in the *Shafpa* situation subsequent payments might produce ordinary income presumably because the sale or exchange was deemed to have taken place in the year of sale.

[14]Treas. Reg. § 1.453-6(a) (2) (1958).

[15]*Id. See also* Rev. Rul. 58-402, 1958-2 CUM. BULL. 15.

[16]19 B.T.A. 1112 (1930).

[17]8 B.T.A. 824 (1927).

likewise held that where notes secured by a second mortgage could not be sold for more than 25 percent of their face value, the second mortgage notes had no readily realizable market value. In other instances, the courts have regarded the mere contractual obligation of the purchaser, without any notes or other evidence of indebtedness, to have no ascertainable market value.[18] Nevertheless, the courts have expressed reluctance to hold the fair market value of negotiable or unconditional obligations to be unascertainable. In *Edward J. Hudson*,[19] the Tax Court held that nonnegotiable notes, the payment of which was subject to complicated conditions, were not the equivalent of cash and not income to the cash basis taxpayer in the year the notes were given.[20] A similar result was reached by the Board of Tax Appeals in *Dudley T. Humphrey*,[21] where a cash basis taxpayer contended that certain nonnegotiable notes received upon the sale of his partnership interest should not be included in his income for the year in which they were given. The Board held that a mere promise to pay in the future which is not accepted as payment, but only as evidence of indebtedness, should not be equated with the receipt of cash.[22]

B. Accrual Basis Taxpayers

Under the accrual method of accounting the right to receive, not the actual receipt, determines the inclusion of the amount in gross income.[23] The regulations state that income is includible in gross income when all the events have occurred which fix the right to receive such income and the amount can be determined with reasonable accuracy.[24] In this regard, it has been generally held that an accrual basis vendor must include the face amount of a purchaser's note, rather than the fair market value, in computing the gain upon the sale or disposition of

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[18]Estate of Clarence W. Ennis, 23 T.C. 799 (1955). *See also* Cambria Dev. Co., 34 B.T.A. 1155 (1936) (no buyer could be found to purchase lots at any price); W. B. Geary, 6 B.T.A. 1109 (1927), *modified*, 30 F.2d 1011 (4th Cir. 1928) (no notes or other evidence of indebtedness but obligation was unconditional).

[19]11 T.C. 1042 (1948), *aff'd per curiam*, 183 F.2d 180 (5th Cir. 1950).

[20]*See also* Mainard E. Crosby, 14 B.T.A. 980 (1929).

[21]32 B.T.A. 280 (1935).

[22]*See also* Bedell v. Commissioner, 30 F.2d 622, 624 (2d Cir. 1929), where Judge Learned Hand stated, "[I]t is absurd to speak of a promise to pay a sum in the future as having a 'market value,' fair or unfair."

[23]Spring City Foundry Co. v. Commissioner, 292 U.S. 182 (1934).

[24]Treas. Reg. § 1.451-1 (a) (1957). *See also* H. Liebes & Co., 90 F.2d 932 (9th Cir. 1937).

property.[25] In *Fisher Brown*,[26] the same result was reached despite the fact that the note was never paid, but was returned to the purchaser in a later year. The Tax Court stated that "[n]either an event of a later year making ultimate payment doubtful nor the recission of the sale in a later year is relevant to the propriety of accruing an obligation as income in the year in which the right to receive payment was fixed."[27] Nevertheless, there are cases holding that an amount need not be accrued and included in gross income by an accrual basis taxpayer where it appears, in the year of accrual, that the amount is uncollectible and there is little or no likelihood of collection in the future.[28]

III. The Statutory Requirements — Section 453 (b)

A. General

The current installment sales provision of the Internal Revenue Code[29] permits a seller to report as gain in subsequent years that portion of yearly receipts from the sale that the gross profit from the sale bears to the contract price.[30] The installment method of reporting is available for (1) sales of real estate by dealers and non-dealers,[31] and (2) casual sales or other disposition of personal property where the selling price exceeds $1,000.[32] The application of section 453 (b) to the above sales or dispositions is further limited by the requirement that payments in the year of sale (exclusive of indebtedness of the purchaser) may not exceed 30 percent of the selling price.[33] Moreover, the installment sales method is not available for reporting losses incurred upon the sale or disposition of the above property.[34]

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[25] *See, e.g.*, George L. Castner Co., 30 T.C. 1061 (1958); Fisher Brown, 9 CCH Tax Ct. Mem. 1054 (1950).

[26] 9 CCH Tax Ct. Mem. 1054 (1950).

[27] *Id.* at 1060.

[28] Corn Exch. Bank v. United States, 37 F.2d 34 (2d Cir. 1930); Joy Mfg. Co., 23 T.C. 1082 (1955); O'Sullivan Rubber Co., 42 B.T.A. 721 (1940); Marguerite Hyde Suffolk & Berks, 40 B.T.A. 1121 (1939); American Fork & Hoe Co., 33 B.T.A. 1139 (1936); Atlantic Coast Line R.R., 31 B.T.A. 730, 749 (1934); Oregon Terminals Co., 29 B.T.A. 1332 (1934).

[29] Int. Rev. Code of 1954, § 453.

[30] *Id.* § 453 (a) (1).

[31] *Id.* § 453 (b) (1) (A).

[32] *Id.* § 453 (b) (1) (B).

[33] *Id.* § 453 (b) (2) (A).

[34] Martin v. Commissioner, 61 F.2d 942 (2d Cir. 1932), *cert. denied*, 289 U.S. 737 (1933). *See also* Rev. Rul. 70-430, 1970-2 Cum. Bull. 51, where a loss sustained on an installment sale of business assets is deductible only in the taxable year in which the sale is made.

The installment sales method is also available in transactions which produce gain, some of which is insulated by the various nonrecognition provisions of the code. For example, if a taxpayer sells his residence having a basis of $20,000 for a selling price of $30,000 and acquires a new residence for $25,000 within the 1-year period prescribed by section 1034,[35] he will realize a gain of $10,000, but will recognize only $5,000. If the 30 percent ceiling on payments in the year of sale is met, the gain recognized as a result of section 1034 should be eligible for installment reporting under section 453 (b).[36] If the sales contract provided for a cash downpayment of $5,000 in the year of sale and $5,000 in each of the 5 subsequent years, one-sixth ($5,000 taxable gain ÷ $30,000 contract price) of each payment received on the principal of the note or mortgage is includible in the seller's income.[37]

This result is not apparent from the statute itself, since section 453 (a) addresses itself to gross profit to be *realized* and seems to ignore the possibility that some of the gain may not be recognized. Such a literal reading of the statute would render ineffective the nonrecognition sections when the taxpayer seeks to employ section 453 (b) to defer his gain. It can hardly be argued that Congress intended such a result when the installment method is elected.[38] The Commissioner has specifically approved the use of the installment method in certain nonrecognition transactions in Revenue Ruling 65-155,[39] where it was held that a taxpayer who claims the benefits of section 1031, relating to like-kind exchanges of productive business or investment property, with additional payments to be received in subsequent years, may elect the installment method, provided that the transaction otherwise qualifies.

Accordingly, gain attributable to the receipt of recognition property (boot) under section 351, relating to transfers to controlled corporations, may be reported under the installment method, provided, of course, the seller does not receive more than 30 percent of the selling price in the year of disposition.[40] For example, if a taxpayer transfers real property

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[35] INT. REV. CODE OF 1954, § 1034, which concerns nonrecognition of gain derived from the sale or exchange of a residence.

[36] Rev. Rul. 75, 1953-1 CUM. BULL. 83.

[37] *Id.*, which states:

> [T]he amount of the recognized gain to be included in gross income in each taxable year in which an installment payment is received is that portion of the installment payments actually received in that year which the total gain to be recognized under section 112 (n) [now INT. REV. CODE OF 1954, § 1034] bears to the total contract price.

[38] *See* Emory, *The Installment Method of Reporting Income: Its Election, Use, and Effect*, 53 CORNELL L. REV. 181, 203 (1968).

[39] 1965-1 CUM. BULL. 356. *See also* Rev. Rul. 75, 1953-1 CUM. BULL. 83.

[40] Some commentators are of the opinion that section 453 does not apply to gain recognized in a section 351 transfer. *See* Emory, *supra* note 38, at 204 n.83.

with a basis of $10,000 to a corporation in return for stock worth $15,000, cash in the amount of $20,000, and an installment note with payments of $8,000 annually for the next 8 years subsequent to the year of sale, the recognized gain of $20,000, by virtue of section 351, would qualify for installment reporting under section 453 (b), provided the taxpayer complies with the control requirement.[41]

The installment method is an elective method of reporting gain and is binding[42] once election is made for a particular taxable year.[43] A separate election under section 453 (b) may be made with respect to each sale of real property and has no effect on the ability of the seller to elect the installment method for transactions in subsequent years. Moreover, the fact that the taxpayer may have employed the accrual method of accounting in prior years is immaterial in regard to his electing the installment method in the current taxable year.[44] The silence of the code and the regulations[45] as to the time for electing the installment method for reporting gains from real estate sales has resulted in a divergence of views within the courts. The Internal Revenue Service attempted to resolve this problem by publishing Revenue Ruling 65-297[46] which states in part:

> if in good faith, the taxpayer failed to exercise the installment method election to report income from the sales of real property on a timely filed return for the year of sale, the Service will recognize as valid elections made under the following circumstances:
>
> . . . .
>
> (2) those cases where election of the installment method was made on an amended return for the year of sale not barred by statute of limitations. . . , if the facts indicate no election inconsistent with the installment election had been made with respect to the sale.
>
> (3) those cases where the election had been made on a delinquent return for the year of sale.[47]

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[41]*See* INT. REV. CODE OF 1954, §§ 351 (a), 368 (c).

[42]In Ivan D. Pomeroy, 54 T.C. 1716 (1970), it was held that a valid installment election, although based upon an erroneous computation, in connection with a sale of real estate could not later be revoked.

[43]For an extended analysis of the problems surrounding the election of the installment method, *see* Emory, *supra* note 38, at 215-31; Note, *Taxation—Installment Sales: Elections Under Section 453,* 40 MISS. L.J. 302 (1969); Note, *Income Tax—Election Under the Installment Sales Provision,* 9 UTAH L. REV. 403 (1964).

[44]Davenport Mach. & Foundry Co., 18 T.C. 39 (1952).

[45]*See* Treas. Reg. § 1.453-8 (b) (1) (1958).

[46]1965-2 CUM. BULL. 152.

[47]*Id.* at 152-53.

The ruling further states that such election made on a delinquent return will not be considered valid if the assessment or collection of any portion of the resulting tax is barred by the statute of limitations.[48] Moreover, the Commissioner acquiesced in a number of cases involving the circumstances under which a timely election will be deemed to have been filed.[49]

The position of the service as stated in the ruling would seem to preclude an election under section 453 (b) if, in a previous year, the taxpayer had elected to treat a transaction as one not under the installment method and such method was held invalid in a subsequent year. For example, assume a taxpayer, in disposing of property, receives notes, which he feels to have no ascertainable market value, and elects to report his gain on the cost recovery method. If subsequently the service determined that the notes did have a definite fair market value which barred the use of the cost recovery method, it would appear that the taxpayer would be precluded from utilizing the installment method with regard to his recalculated tax liability. Such was the holding of the Tax Court in *Mamula v. United States*[50] where the taxpayer chose to report the income from the sale of real property on the cost recovery method, since he believed the notes he received to have no ascertainable value. Although the Tax Court upheld the Commissioner's finding that the notes did have an ascertainable value and the cost recovery method was unavailable, the court of appeals reversed and held that an unallowable method originally selected in good faith and fully disclosed should not preclude the subsequent use of section 453(b).[51]

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[48]*Id.* at 153.

[49]*See, e.g.,* Baca v. Commissioner, 326 F.2d 189 (5th Cir. 1964), *rev'g* 38 T.C. 609 (1962) (election may be made on a late return even though failure to file a timely return was attributed to negilence); The Glidden Co. v. United States, 241 F. Supp. 195 (N.D. Ohio 1964) (an election may be made where a "lease" is subsequently held to be a sale prior to expiration of the statute of limitations); Jack Farber, 36 T.C. 1142 (1961), *aff'd on other grounds,* 312 F.2d 729 (2d Cir. 1963) (election is valid if made on a return for the first taxable year in which any portion of the selling price is received); John F. Bayley, 35 T.C. 288 (1960) (gain realized under section 1034, which is later held inapplicable, may be reported on the installment method through an amended petiton to the Tax Court); Robert L. Griffin, 24 CCH Tax Ct. Mem. 467 (1965) (election may be made on an amended return filed prior to the receipt of any portion of the selling price).

[50]346 F.2d 1016 (9th Cir. 1965), *rev'g* 41 T.C. 572 (1964).

[51]*See* John Harper, 54 T.C. 1121 (1970), where the taxpayers fraudulently failed to report the sale of real estate until the omission was discoverel by the Commissioner. A subsequent attempt to elect the installment method was thwarted by the Tax Court, which distinguished the honest mistake made in *Mamula.*

The code[52] and the regulations[53] clearly indicate that the absence of any installment payment in the year of sale will not prevent an election under section 453 (b). Furthermore, the Commissioner and Tax Court have ruled that the installment method will be available to those sales of real estate which provide for two or more payments in 2 or more taxable years.[54] Accordingly, a lump sum payment in a year subsequent to the sale would not qualify for installment treatment under section 453 (b). In *10-42 Corporation*,[55] the taxpayer sold real property under an agreement providing for the execution of a purchase-money mortgage due in 11 years in a single payment. The Tax Court held that the taxpayer could not avail itself of the installment method under section 453 (b) and that the elimination of the initial payments rule of prior law did not alter this dual-installment requirement of section 453 (b).

B. Sale or other Disposition of Property

In order for any real property transaction to qualify for installment treatment under section 453 (b), there must be a "sale or other disposition" of the property.[56] While deceptively simple in appearance, the phrase "sale or other disposition" has been the subject of much controversy within the courts, particularly in those cases involving leases, substitute compensation, and assignment of income. The determination of a transaction's eligibility for installment reporting has largely turned on the property status of the subject matter involved in the transfer. In *Charles E. Sorensen*,[57] the Tax Court held that proceeds realized from the sale of stock options, received by the taxpayer as compensation, produced ordinary income rather than capital gain, and that such proceeds were not eligible for installment treatment under section 453 (b).[58] In *Realty Loan Corp.*,[59] the taxpayer sold a mortgage service business whose

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[52] INT. REV. CODE OF 1954, § 453 (b) (2) (A) (i).

[53] Treas. Reg. § 1.453-4 (b) (1) (1958).

[54] 10-42 Corp., 55 T.C. 593 (1971); Thomas F. Prendergast, 22 B.T.A. 1259 (1931); Rev. Rul. 69-462, 1969-2 CUM. BULL. 107.

[55] 55 T.C. 593 (1971).

[56] INT. REV. CODE OF 1954, § 453 (b) (1) (A).

[57] 22 T.C. 321 (1954).

[58] *See also* Lozoff v. United States, 67-1 U.S. Tax Cas. ¶ 9436 (E.D. Wis. 1967) (amount received for release from personal service contract held to be ordinary income and not gain from the sale or exchange of a capital asset. Consequently, the installment method was not available); Leonard Hyatt, 30 P-H Tax Ct. Mem. ¶ 61,318 (1961), (assignment of insurance agency management contract held to be a substitute for future compensation and ineligible for installment treatment).

[59] 54 T.C. 1083 (1970).

activity consisted primarily of collecting mortgage payments and remitting them to the insurance companies to whom they had been assigned by the taxpayer. The sale of the business included the right to receive future service fees on mortgages serviced by the company. In allocating the sales price between goodwill, which received capital gain treatment, and the right to future income, which was treated as ordinary income, the Tax Court held that since both capital assets and the right to future income "are property" and the right to such income is not compensation for services, the taxpayer could report the entire gain on the installment method. The court distinguished *Sorensen* by stating that had the taxpayer there exercised his options, the difference in the fair market value and the option price would have been income at that time as compensation for services—the same result ensuing from the sale of the options. The court noted that had the taxpayer in *Realty* retained the mortgage business, it would have received income spread over the next 8 years and would have serviced the mortgages. The court decided that the income sold by the taxpayer was not compensation for services, as in *Sorensen,* but rather was future profit to be realized from services rendered by another after the sale.[60]

While the former cases illustrate the problems encountered by the courts when construing transactions involving property other than real estate, many of the problems stemming from the ordinary income-compensation dichotomy become ancillary to others when applied to transactions involving real property. Since section 453 (b) clearly applies to both nondealers and dealers of real property, the applicability of the installment method to real estate transactions should not depend upon the character of the gain realized on the sale or disposition. Potential problems in the area of real property transactions are centered around the classification of a particular transaction as a sale or lease and also the assignment of income.

In the recent case of *Modiano-Schneider, Inc. v. Commissioner,*[61] a doctor attempted to acquire 100 percent financing of a hospital and medical building to be constructed upon his property. The doctor conveyed the property to the taxpayer, a construction corporation, which was successful in securing the necessary financing. After the taxpayer reconveyed the property to the doctor, subject to a deed of trust, the property was leased to the taxpayer, who then subleased the property to a partnership which included the doctor. The lease provided that the doctor could terminate the lease by paying a stipulated amount for each

[60]Both the government and the taxpayer have appealed the decision to the Ninth Circuit Court of Appeals.

[61]42 P-H Tax Ct. Mem. ¶ 73,005 (1973).

month remaining in the lease. When a subsequent partnership reorganization resulted in the termination of the doctor's interest, the taxpayer reported as long term capital gain the payment received pursuant to the lease cancellation agreement. The Tax Court rejected the Commissioner's determination that the taxpayer was attempting to report income from a construction contract by the installment method, and held the gain to be taxable as a capital gain because it resulted from the cancellation of a bona fide lease.[62] The court further noted that the taxpayer had assumed substantial obligations as lessee, such as repairing damage caused by fire, earthquake, or other causes and that such factors weighed heavily in support of a bona fide, arm's length transaction.

One example where land transactions were held to be contracts for sale rather than leases is found in *J. O. Finney*,[63] where, in 1955, the taxpayers purchased certain parcels of real estate and later entered into a contract for the sale of the property in the same year. Title to the property was to pass to the purchaser upon payment of the entire purchase price. In the event of default, the agreement provided for immediate repossession by the seller and the forfeiture of all prior payments as liquidated damages. Prior to the purchaser's default in 1960, the taxpayers reported gain realized from the sale on the installment method. The Tax Court found that, while it was true that the rights which the purchaser acquired in the property were defeasible upon default, the transaction was nevertheless a sale and that the gains realized therefrom were reportable on the installment method. The result reached in *Finney* is consonant with the current regulations[64] which define deferred payment sales of real property as including "agreements of purchase and sale which contemplate that a conveyance is not to be made at the outset, but only after all or a substantial portion of the selling price has been paid."[65]

Having once determined a transaction to be a sale or disposition, it becomes necessary to determine the precise subject matter of the sale. Real estate sales of multiple tracts or parcels present special problems in that taxpayers have frequently contended that a particular sale of real property is in fact more than one sale and that each should be applied

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[62] *Cf.* Billy Rose's Diamond Horseshoe, Inc. v. United States, 448 F.2d 549 (2d Cir. 1971) (release of lessee's duty under a lease restoration clause in exchange for promissory notes held not to be a "sale" within section 453). *See also* Rev. Rul. 68-226, 1968-1 CUM. BULL. 362 (interest of a lessee in oil and gas in place is an interest in real property, income from the sale of which may be reported on the installment method).

[63] 37 P-H Tax Ct. Mem. ¶ 68,283 (1968).

[64] Treas. Reg. § 1.453-4 (a) (1958).

[65] *Id.*

against the installment sales requirements to determine eligibility for that method of reporting. On the other hand, the Commissioner may attempt to separate a single sale so that the installment method will be unavailable to two or more of the resulting divisions.[66] While the regulations indicate separate treatment for sales of lots or parcels from a subdivided tract,[67] nothing is stated as to the result when two or more otherwise separate sales are consummated with the same vendee at the same time.

In *Nathan C. Spivey*,[68] the taxpayers sold their farm and residence in 1957 by a single deed for $100,000, consisting of $10,000 cash in the year of sale and the balance to be paid in annual installments and secured by a deed of trust. The taxpayers and purchasers agreed that the selling price of the residence was $12,500 and that payments were to be first applied to the selling price of the house. Thinking the payments received in the year of sale to be nontaxable under section 1034, the taxpayers reported no income from the sale of the property for the year 1957. The Commissioner argued that the sale of the farm land and buildings, including the residence, was a single transaction and that the taxpayers forfeited their right to an installment election due to their failure to do so in 1957. The Tax Court disagreed and viewed the transaction as two separate conveyances—one involving the sale of a residence under section 1034, and the other involving ordinary recognition property. Consequently, it was held that the installment method would be available in the first year in which recognizable payments were received.

The taxpayer in *Boyd A. Veenkant*[69] was not so fortunate. In that case the taxpayer sold two adjoining parcels, upon one of which was located a motel and upon the other his personal residence. The contract was void of any allocation of the purchase price, $80,000, and the initial payment, $25,000, between the two parcels. The taxpayer subsequently attempted to make such allocation on his tax return for the year of sale and to utilize the installment method of reporting the gain with respect to each sale. The Tax Court determined that in accordance with the contract there was a single indivisible sale, the gain attributable to which was not eligible for installment reporting due to the excessive payments in the year of sale.[70]

The Tax Court decision in *Charles A. Collins*[71] muddied the waters of split sales and the criteria surrounding such transactions. In *Collins,*

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[66]*See, e.g.*, Divine v. United States, 10 Am. Fed. Tax R.2d 5403 (W.D. Tenn. 1962).

[67]Treas. Reg. § 1.453-5 (a) (1958).

[68]40 T.C. 1051 (1963).

[69]37 P-H Tax Ct. Mem. ¶ 68,119 (1968).

[70]*See also* Buckeye Engine Co., 11 B.T.A. 318 (1928).

[71]48 T.C. 45 (1967).

the taxpayer sold slightly over 52 acres of land for approximately $263,000, of which $118,000 was paid as a cash down-payment and the balance of $145,000 represented by notes secured by a purchase money mortgage on approximately 32 acres. Despite the fact that the payments in the year of sale exceeded the 30 percent requirement of section 453 (b) the Tax Court regarded the transaction as two sales—one involving 32 acres and another involving the remaining unencumbered property—and held that the installment method could be elected with respect to the mortgaged parcel.[72] The result in *Collins* is overly benevolent to the taxpayer who gave no indication that he desired separate sale treatment until he filed his tax return for the year of sale. The *Collins* decision represents a clear victory for form over substance—an anachronism in today's tax environment, where too often the form of a transaction is pierced to the detriment of the taxpayer.

C. The 30 Percent Ceiling

The requirement that the taxpayer receive not more than 30 percent of the selling price in the year of sale[73] is a basic requirement for eligibility under section 453 (b). The "selling price" is the total consideration received by the vendor and includes the amount of any mortgage to which the property is subject, regardless of whether the property is merely taken subject to the mortgage or whether the purchaser assumes the mortgage.[74] The importance of the determination of the selling price cannot be overemphasized, since the selling price is the measuring rod against which payments in the year of sale are applied for the purpose of determining compliance with the 30 percent rule. In *Gralapp v. United States,*[75] the taxpayers received, as consideration for the sale of interests in oil and gas leases, a specified minimum price plus an additional amount contingent upon the oil production from the leases. Although the payments in the year of sale were less than 30 percent of the

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[72]The Tax Court upheld the taxpayer's division of the sale as follows: (1) 19.67 acres sold for cash of $98,350, and (2) 32.89 acres sold for $164,450, consisting of $19,670 cash and a mortgage for $144,780. The taxpayer was allowed to report the gain derived from the sale of the larger tract on the installment method. *Id.* at 48. *But see* Rev. Rul. 57-434, 1957-2 CUM. BULL. 300, where if under state law or regulations a minimum downpayment exceeds the maximum permitted under the installment provision, the sale does not qualify for installment treatment. However, the use of the installment method is not precluded in reporting the payment with respect to the remainder of the property included in the sale.

[73]"Year of sale" refers to the taxable year of sale and not necessarily to the 12-month period subsequent to the sale. INT. REV. CODE OF 1954, § 453 (b) (2).

[74]Treas. Reg. § 1.453-4 (c) (1958).

[75]319 F. Supp. 265 (D. Kan. 1970), *aff'd,* 458 F.2d 1158 (10th Cir. 1972).

minimum selling price, it was held that the statute contemplates a definite and readily ascertainable total contract or selling price at the time the contract was made in order to qualify for installment reporting. Accordingly, the taxpayers were denied the use of the installment method for any portion of the sale.

In addition to cash received or to be received, the computation of the selling price includes the fair market value of other property received by the seller. An apparent distinction exists when the "other property" consists of the right to receive money. When part of the consideration received by the seller includes obligations of persons other than the purchaser, such obligations must be included in the computation of the selling price at their fair market value.[76] However, where the consideration consists of obligations of the purchaser, the obligations are included at their face value.[77]

While the 30 percent ceiling on year-of-sale payments[78] *(exclusive* of the purchaser's evidence of indebtedness) is couched in simple language within the code, the determination of what consideration is actually regarded as a payment in the year of sale has presented a thorny problem for both the taxpayer and the courts. The 30 percent requirement of section 453 (b) is linked to "payments" in the year of sale, not the payment requirements recited in the sales contract. Therefore, the term "payments" means the performance of the consideration provisions in accordance with the true agreement of the parties.[79] In *Lewis M. Ludlow,*[80] this principle was applied when the installment method was made available to the taxpayer even though the transaction failed to comply with the 30 percent requirement due to an error in computation. The Tax Court found that the true intent of the parties evidenced compliance with the installment sales provision and that return of the overpayment,

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[76]Tombari v. Commissioner, 299 F.2d 889 (9th Cir. 1962). In *Tombari* the court held that the taxpayer could not, on one hand, use the face amount of a third party obligation received ($75,000) to balloon the selling price figure, while on the other use the lower fair market value of the obligation ($50,000) in computing the payments in the year of sale.

[77]*See* Emory, *supra* note 38, at 232 n.208 which contends that such result is essential to an initial determination of the income to be included by the seller over the life of the contract.

[78]The original statute, Revenue Act of 1926, ch. 27, § 212 (d), 44 Stat. 23, used the term "initial payments" with regard to the 30 percent limitation. *See* 2 J. MERTENS, *supra* note 2, at § 15.18.

[79]2 J. MERTENS, *supra* note 2, at § 15.18.

[80]36 T.C. 102 (1961), *acquiesced in,* 1961-2 CUM. BULL. 5.

even though made in the following taxable year, amounted to an effective reformation of the contract.[81]

The sale of real estate not infrequently results in the vendee's assumption of an existing mortgage or his taking the realty subject to the encumbrance. The regulations provide that in the sale of mortgaged property, whether the property is sold subject to the mortgage or the mortgage is assumed by the purchaser, the mortgage is included as part of the year-of-sale payments only to the extent that the encumbrance exceeds the basis of the property.[82] The purpose of this regulation has been expressed by the Tax Court as follows:

> In the case of real property sold on the installment plan where there was a mortgage on the property which the buyer either assumed or took the property subject to, the statutory scheme of returning a portion of each payment as income in the year received did not reach all of the seller's profit, since the total amount of the selling price was not paid over by the buyer to the seller; that portion of the selling price represented by the mortgage was paid by the buyer directly to the mortgagee. To remedy this, regulations were issued. . .to provide that the amount of the mortgage, to the extent that it did not exceed the seller's basis in the property sold, was not to be considered a part of the "initial payments" or of the "total contract price."[83]

Furthermore, any payment in the year of sale by the purchaser with respect to an *accrued* portion of the vendor's mortgage liability will be regarded as a payment for the purpose of the 30 percent requirement.[84]

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[81] *Cf.* Rev. Rul. 56-20, 1956-1 CUM. BULL. 197 (Where vendor reserves right to require purchaser to make payment of purchase price at closing either in cash or partly in cash and notes, acceptance of purchase price in cash precludes a subsequent alteration of the sale by vendor in an attempt to utilize section 453); Rev. Rul. 55-694, 1955-2 CUM. BULL. 299 (where vendor has under contract of sale an unqualified right to receive total purchase price during taxable year of sale, payments in the year of sale limitation has not been met and transaction does not qualify for installment treatment).

[82] Treas. Reg. 31.453-4(c) (1958). *See also* Burnet v. S&L Bldg. Corp., 288 U.S. 406 (1933); Walter Kirschenmann, 57 T.C. 524 (1972) (in determining whether an assumed mortage exceeds the basis, selling expenses were held not to be an addition to the basis); R.A. Waldrep, 52 T.C. 640 (1969), *aff'd per curiam,* 428 F.2d 1216 (5th Cir. 1970).

[83] Stonecrest Corp., 24 T.C. 659, 665 (1955), *nonacquiesced in,* 1956-1 CUM. BULL. 6.

[84] *See, e.g.,* Sterling v. Ham, 3 F. Supp. 386 (D. Me. 1933) (payments by vendor to mortgagee when mortgage foreclosed several years prior to the sale held to be payments in the year of sale). *See also* Rev. Rul. 60-52, 1960-1 CUM. BULL. 186 (liabilities of the seller, which are assumed and *paid* by the purchaser in the taxable year of sale, are included as payments in the year of sale).

Nevertheless, "installment payments actually received" does not include payments made by the vendee to the mortgagee to reduce the mortgage assumed in connection with the sale.[85]

Since the regulation requiring inclusion of the excess of an assumed mortgage over the basis raised qualification problems under the 30 percent requirement, taxpayers instinctively sought methods to circumvent the regulation. In *Stonecrest Corp.*,[86] the purchaser of mortgaged property agreed to make payments on the purchase price for a period of years, after which the seller was to convey the property to the purchaser who was then to take over the remaining mortgage payments. The mortgage on the property exceeded the seller's basis in the property. The Tax Court held that under those facts "there was no present assumption of the morgage nor was the property taken subject to the mortgage,[87] as those expressions are customarily used,"[88] and that consequently it was error to include the excess of the mortgage over the basis in the initial payments.

A substantially similar result was reached in *United Pacific Corp.*,[89] where the Commissioner again sought a broad application of the regulation to include *every* sale of mortgaged property. The Tax Court found *Stonecrest* indistinguishable and held that the purchaser's promise to assume the mortgage 5 years subsequent to the sale did not constitute a present assumption of the mortgage within the meaning of the regulation. Thus it may be concluded that the mere fact that the mortgage indebtedness exceeds the basis of the property at the time the sales contract is executed will not necessarily result in the excess being treated as a year-of-sale payment. Moreover, a vendor who desires to sell property mortgaged in excess of its basis should find amnesty from the regulations in *Stonecrest* by delaying conveyance of title to the property at least until the mortgage liability has been reduced to an amount equal to or less than the basis of the property. The result is not as clear, however, when the seller simply postpones the transfer of title until the year following

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[85]Burnet v. S&L Bldg. Corp., 288 U.S. 406 (1933). *But see* Samuel Pollack, 47 T.C. 92, 113 (1966), where the Commissioner unsuccessfully argued that first-year payments on an assumed mortgage were payments for the purposes of the 30 percent rule.

[86]24 T.C. 659 (1955), *nonacquiesced in,* 1956-1 CUM. BULL. 6.

[87]The Tax Court noted that in determining whether a transfer is made subject to a mortgage, a controlling factor is whether the mortgage was considered in adjusting the purchase price. Finding no reduction of the selling price in the instant case, the court concluded that the seller had intended to pay the mortgage debt out of the proceeds of the sale. 24 T.C. at 667-68.

[88]*Id.* at 668.

[89]39 T.C. 721 (1963).

the year of sale, at which time the mortgage indebtedness still exceeds the basis of the property. Arguably, the contract would still be void of any *present* assumption of the mortgage in the year of sale, and the regulation would not apply to include the excess of indebtedness over the basis as payments received in the year of sale.

If, in the sale of mortgaged property, the mortgagee agrees to a novation substituting the buyer as the debtor personally liable and releasing the seller from his prior liability, the entire amount of the indebtedness should be included in the computation of year-of-sale payments.[90] The novation represents an extinguishment of the seller's liability to the mortgagee and resembles a cancellation of indebtedness.[91] Conceivably, the *Stonecrest* holding might be applied to a transaction in which the novation is postponed until a subsequent year in order to avoid qualification problems under the 30 percent requirement.

Once the real estate vendor has determined the selling price and effectively complied with the 30 percent ceiling on year-of-sale payments, he must next calculate the "contract price" and his "gross profit"—two terms essential to the computation of the vendor's ratable gain to be recognized upon receipt of each installment payment. The contract price calculation is identical to that of the selling price with one exception: the amount of any mortgage indebtedness is included only to the extent that such indebtedness exceeds the basis of the property.[92] "Gross profit," in the case of a sale of real estate by a person other than a dealer, is defined as the selling price less than the adjusted basis and selling expenses.[93] Gross profit for dealers in real estate is computed in the same manner except no deduction for selling expenses is allowed. It should be remembered that while the dealer in real property is not afforded a deduction for his selling expenses in the computation for the purpose of the installment provision, such expenses are clearly deductible as ordinary business expenses when paid or accrued, depending upon the accounting method employed.[94]

The following example illustrates the principles of installment reporting previously discussed. On December 1, 1972, a calendar year taxpayer, who is not a dealer in real property, sells land having a basis of

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[90]*See* Ivan Irwin, Jr., 45 T.C. 544, 551 (1966).

[91]*See* Rev. Rul. 71-515, 1971-2 CUM. BULL. 222 (income from the sale of real property may not be reported under the installment method where the buyer, as part of the consideration, cancels the seller's first mortgage note in an amount exceeding 30 percent of the selling price).

[92]Treas. Reg. § 1.453-4 (c) (1958).

[93]Treas. Reg. § 1.453-1 (b) (1958), *as amended,* T.D. 6873, 1966-1 CUM. BULL. 101.

[94]Solly K. Frankenstein, 31 T.C. 431 (1958), *aff'd,* 272 F.2d 135 (7th Cir. 1959), *cert. denied,* 362 U.S. 918 (1960).

$50,000 and subject to a mortgage of $20,000. The vendee assumes the mortgage and, in addition, agrees to pay back taxes of $1,000 and accrued interest of $1,000. The vendee pays $10,000 cash at closing and executes notes for $70,000. The selling expenses are $2,000. The vendee pays the accrued interest immediately following the sale but waits until January, 1973, to pay the back taxes. The taxable gain to be reported by the vendor in 1972 is $6,710, computed as follows:

(1) Selling price:		
cash paid at closing	$10,000	
notes of the vendee	70,000	
interest assumed	1,000	
taxes assumed	1,000	
mortgage assumed	20,000	102,000
less:		
basis of the property	50,000	
selling expenses	2,000	52,000
Gross Profit on Sale		50,000
(2) Payments in Year of Sale:		
cash	10,000	
interest paid by vendee	1,000	11,000
(3) Ratio of Payments to Selling Price:		
11,000/102,000 does not exceed 30 percent		
(4) Amount Taxable in 1972:		
Contract price:		
cash	10,000	
notes	70,000	
interest assumed	1,000	
taxes assumed	1,000	82,000

Gross Profit Ratio:

$$\frac{\text{Gross profit}}{\text{Contract price}} = \frac{50{,}000}{82{,}000} \text{ or } 61 \text{ percent}$$

Payments in year of sale (11,000) $\times$ 61 percent,
Amount taxable in 1972: $ 6,710

IV. Collateral Problems

A. Imputed Interest—Section 483

The installment sales regulations provide that any total unstated interest, as defined in section 483, under a contract for the sale or exchange

of property containing payments subject to section 483, shall not be included as part of the selling price or total contract price.[95] Unstated interest or an unrealistically low rate of interest may prove to be a tax trap for the unwary seller, since a reduction of the selling price by the amount of unstated interest may preclude the use of the installment method due to the excess of the year-of-sale payments over the recomputed selling price. If the contract provides for interest at the rate of at least 4 percent simple interest per annum, there is no unstated interest, and section 483 is not applicable to payments received under the contract.[96] Furthermore, section 483 is not applicable to contracts involving a selling price of $3,000 or less.[97] Nevertheless, if a district director ascertains from the surrounding facts and circumstances that a single transaction with a sales price in excess of $3,000 has been fragmented into several smaller transactions to avoid the application of section 483, he may determine that section 483 applies.[98] If the contract fails to provide for at least 4 percent simple interest, the total unstated interest is computed by discounting each payment due at 5 percent simple interest compounded semiannually,[99] reduced by the present values of the interest, if any, stated in the contract.[100] For example, on July 1, 1972, a calendar year taxpayer, who is not a dealer in real property, sells real estate for $10,500 payable as follows: cash in the amount of $3,000 at the time of sale, and the balance of $7,500 in three installments of $2,500 each, due 1, 2, and 3 years respectively from the date of sale. No interest is stated in the contract. The present value of the payments to which the unstated interest rule applies is as follows:

Amount of Payment	Deferral Period	Present value of $1 payable at end of period	Present Value of Payment
$ 3,000	0 months	1.00000	$3,000.00
2,500	12	.95181	2,379.53
2,500	24	.90595	2,264.88
2,500	36	.86230	2,155.75
10,500			$9,800.16

[95]Treas. Reg. § 1.453-1 (b) (2) (1958), *as amended,* T.D. 6873, 1966-1 CUM. BULL. 101.

[96]Treas. Reg. § 1.483-1 (d) (2) (1966).

[97]INT. REV. CODE OF 1954, § 483 (f) (1).

[98]Treas. Reg. § 1.483-2 (b) (1966).

[99]*Id.* § 1.483-1 (c) (2).

[100]INT. REV. CODE OF 1954, § 483 (b).

The total unstated interest is $699.84 ($10,500 minus $9,800.16) and must be deducted from the original selling price to arrive at the recomputed selling price, $9,800.16. Without considering unstated interest, the payment received in the year of sale does not exceed 30 percent of the selling price. However, the $3,000 payment does exceed 30 percent of the recomputed selling price, and the transaction, therefore, does not qualify for the installment method of reporting the realized gain from the sale. It should be noted that section 483 does not apply if the gain on a transaction would not be treated as gain derived from the sale or exchange of a capital asset or property described in section 1231.[101] Thus, dealers in real property who employ the installment method of reporting gain from the sales of parcels will rarely encounter section 483 since the parcels would not be capital assets in the hands of such dealers.[102]

The most obvious and also the easiest tactic to dilute the effect of the unstated interest provision is to provide for at least 4 percent simple annual interest in the contract, while simultaneously increasing the selling price to compensate for the difference in the prevailing market interest rate and the 4 percent contract rate. Thus, if the prevailing market interest rate as 8 percent, a taxpayer, who is not a dealer in real property, may effectively transform 4 percent of his selling price from ordinary income into capital gains. Another solution to potential qualification problems under the 30 percent rule due to unstated interest is to reduce the amount of payments in the year of sale to an amount less than or equal to 30 percent of the recomputed selling price. The vendor should exercise caution, however, in attempting to qualify for installment reporting after the initial sale has occurred, as such attempts have frequently met heated opposition by the Commissioner.[103]

B. The Problem of Substitute Collateral

The general rules for disposition of installment obligations, *i.e.* the note or mortgage given by the vendee, provide that if the obligations are sold or exchanged, the gain or loss recognized is the difference between the basis of the obligations and the amount realized.[104] If, however, the disposition is otherwise than by sale or exchange, the gain or loss recognized is the difference between the fair market value of the obligation

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[101] *Id.* § 483 (f) (3). This exception applies only to the treatment of the seller. Section 483 may still apply for determining the purchaser's interest deduction if the contract is one to which section 483 applies. *See* Treas. Reg. § 1.483-2 (b) (3) (ii) (1966).

[102] *See* INT. REV. CODE OF 1954, §§ 1221, 1231.

[103] *See* note 82 *supra*.

[104] INT. REV. CODE OF 1954, § 453 (d) (1) (A).

at the time of disposition and the basis of the obligation.[105] The "basis" of an installment obligation is generally the excess of the unpaid balance over an amount equal to the income that would be reportable if the obligation were satisfied in full.[106] An important proviso with regard to the disposition of installment obligations is that the gain or loss recognized upon such disposition is regarded as the product of the sale or exchange of the property in respect of which the obligation was received by the taxpayer.[107] Thus, the character of the asset generating the installment obligation will determine the character of the gain or loss recognized upon the disposition.[108]

Frequently, a vendor will sell real property to a commercial land developer who will subsequently attempt to finance his development project through a third-party lender. If the installment seller agrees to a subordination of his purchase-money mortgage or accepts substitute collateral so that the lender may obtain a first mortgage as security for its loan, the question arises as to whether such substitution is equivalent to a disposition of the vendee's obligation by the installment seller. Unfortunately, the question has not been resolved to any degree of certainty within the courts.

In *Burrell Groves, Inc.*,[109] the taxpayer elected the installment method when it sold property, a citrus grove, to its shareholders, with the purchase price being secured by a mortgage. Upon a subsequent sale of the property by the shareholders, the taxpayer surrendered and cancelled the notes and mortgage of its shareholders and received notes of the new purchaser bearing different interest and maturity dates and secured by a new mortgage. The Fifth Circuit Court of Appeals upheld the Tax Court's determination that the substitution of the notes and the mortgage amounted to a disposition and that the taxpayer was required to report its gain in the year it received the substituted obligations.[110] The service, however, took a different position in Revenue Ruling 55-5[111] when it held that the substitution of a mortgage contract, in an amount equal to the unpaid balance of the purchase price and payable on the same

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[105] *Id.* § 453 (d) (1) (B).

[106] *Id.* § 453 (d) (2).

[107] *Id.* § 453 (d) (1).

[108] *See* Rev. Rul. 64-178, 1964-1 CUM. BULL. 171.

[109] 22 T.C. 1134 (1954), *aff'd*, 223 F.2d 526 (5th Cir. 1955).

[110] An interesting question was raised by the taxpayer as to whether the sale or exchange of an installment obligation under an installment payment arrangement is itself subject to the installment election. The court found it unnecessary to decide the question since it held the disposition in the instant case to be by payment or novation and not by "sale or exchange."

[111] 1955-1 CUM. BULL. 331.

terms as the land contract for which the substitution was made, resulted in a change in the type of security only and did not constitute a disposition giving rise to gain or loss.[112] The Tax Court spoke once again on the problem in *John L. Cunningham*[113] when it held that no disposition resulted when the purchaser of stock in a concrete products corporation later sold the stock to a corporation which assumed the installment obligations. Moreover, the court stated that neither the reduction of the principal amount of installment obligation nor the waiver of interest thereon connotes a disposition of the obligation. Thus, in *Cunningham* the underlying security remained unchanged as did the security in the revenue ruling. In Revenue Ruling 68-419[114] the service further held that the modification of the terms of a purchaser's note to defer the maturity dates and even increase the interest rate is not tantamount to a disposition of the installment obligation under section 453(d).

Whether the dictum of *Burrell Groves* remains viable in the wake of *Cunningham* and the service rulings is open to question. If an installment seller agrees to a subordination of his purchase-money security to enable the purchaser to secure financing for development upon the real estate subject to the installment sale, Revenue Ruling 55-5 would seem to sanction such substitution of security through the same obligor while preserving the seller's installment election. Moreover, *Burrell Groves* involved the substitution of the installment *obligation* in addition to the collateral securing the debt and even further, the *cancellation* of the obligation of the original purchaser. It can hardly be argued that the mere substitution of the collateral securing the installment obligation undermines the integrity of the installment sales provisions. The installment seller's economic gain will continue to be realized over future payments received from the original obligor—an arrangement which clearly would have been eligible for installment reporting from the inception of the sale.

C. Transmission of Installment Obligations at Death

Section 453 (d) specifically provides that the transmission of an installment obligation upon the death of the owner of such obligation shall not be deemed a disposition subject to the rules of gain or loss previously discussed.[115] Upon the death of the owner of an installment

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[112] *See also* Rev. Rul. 68-246, 1968-1 CUM. BULL. 198, (substitution of an escrow deposit for a deed of trust is not a "disposition").

[113] 44 T.C. 103 (1965), *acquiesced in,* 1966-2 CUM. BULL. 4.

[114] 1968-2 CUM. BULL. 196.

[115] INT. REV. CODE OF 1954, § 453 (d) (3).

obligation, the right to receive future payments will pass to the decedent's estate and is subject to the rules governing income with respect to a decedent.[116] Any payments made to the decedent's estate during the period of administration will result in recognizable income to the estate in the same amount and character as would have been reported by the decedent had he lived.[117] If the installment obligation is not collected during the period of administration, any subsequent disposition by sale or exchange through the estate, including distributions in satisfaction of a pecuniary bequest, will result in taxable income to the estate to the extent that the greater of the amount of consideration received or fair market value of the obligation exceeds the basis of the obligation,[118] with the character again determined by reference to the decedent.[119] A disposition of the installment obligation by the estate in satisfaction of a specific or residuary bequest or according to local laws of descent and distribution, however, will not result in taxable income to the estate.[120] Instead, the recipient of the obligation, with the exception of a distributee in satisfaction of a pecuniary bequest, will continue to report income in the same amount and character as would have been reported by the decedent.[121] Any subsequent sale or disposition by such beneficiary will result in taxable gain to the extent that the greater of the amount of consideration received or fair market value of the obligation exceeds the basis of the obligation.[122] Of paramount importance is the fact that the distributee of an installment obligation under section 691 is not afforded the benefit of a stepped-up basis[123] with respect to the obligation, but is allowed an income tax deduction for estate taxes attributable to the inclusion of the installment obligation in the decedent's gross estate.[124]

D. Default and Repossession

Prior to 1964, any repossession of real property by a vendor who had elected the installment method was regarded as a disposition of the installment obligation and the ensuing gain or loss was recognized accordingly.[125] Frequently, the recognition of gain upon repossession by

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[116] *Id.* § 691.
[117] *See id.* §§ 691 (a) (3), (4) (B).
[118] *Id.* §§ 691 (a) (2), (4) (B).
[119] *Id.* § 691 (a) (3).
[120] *Id.* § 691 (a) (2).
[121] *Id.* §§ 691 (a) (3), (4) (B).
[122] *Id.* §§ 691 (a) (2), (4) (B).
[123] *See id.* §§ 1014 (b) (9), (c).
[124] *Id.* § 691 (c).
[125] *See, e.g.*, Lucille L. Morrison, 12 T.C. 1178 (1949).

the installment vendor would create an immediate tax liability in excess of the vendor's current liquidity—a situation similarly encountered by the vendor had the installment method been unavailable in the year of sale.

With the enactment of section 1038 the former rules for repossession were relaxed so that any gain or loss realized upon repossession will be recognized only to a limited extent.[126] In order to qualify for non-recognition treatment under section 1038, the seller must reacquire the real property in partial or full satisfaction of the indebtedness which such property secures,[127] and the indebtedness must have arisen from the sale of the property by the seller.[128] For the purpose of section 1038 a repossession includes voluntary conveyance from the purchaser, abandonment, strict foreclosure,[129] foreclosure by entry and possession,[130] foreclosure by writ of entry,[131] or by publication or notice,[132] and foreclosure by judicial sale or power of sale in which a competitive bid is entered.[133] Furthermore, a sale for the purpose of section 1038 includes contract sales in which title or possession will not pass to the purchaser until he partially or fully satisfies his contractual obligations.[134] Section 1038 will not apply to a reacquisition in which the seller pays consideration in addition to discharging the purchaser's indebtedness, unless the original sales contract so provided or unless default has occurred or was imminent.[135]

Obviously, section 1038 will not apply to the usual situation where the installment seller receives, as satisfaction for the buyer's installment obligation, the proceeds from a judicial sale of the property or sale pursuant to a deed of trust. In such case there would clearly be a disposition of the vendee's installment obligation in accordance with section 453 (d). Where there is a repossession or reacquisition of the property subject to the installment sale, however, the general rule is that the gain result-

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126INT. REV. CODE OF 1954, § 1038 .

127*Id.* § 1038 (a) (2).

128*Id.* § 1038 (a) (1). For the effect of repossession of real property, the sale of which resulted in non-recognition gain under section 1034, *see id.* § 1038 (e).

129In a majority of jursidictions strict foreclosure of a mortgagor's interest by a morgagee is not permitted. *See generally* G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES §§ 311-12 (2d ed. 1970).

130Such foreclosure exists in four New England states: Massachusetts, Maine, New Hampshire, and Rhode Island. *Id.* § 314.

131*Id.*

132Strict foreclosure may be accomplished in Maine by advertisement of default and intention to foreclose after one year. *Id.* § 315.

133Treas. Reg. § 1.1038-1 (a) (3) (ii) (1967).

134*Id.* § 1.1038-1 (a) (2) (i).

135*Id.* § 1.1038-1 (a) (3) (i).

ing from the repossession is the amount by which the money and fair market value of property the seller receives prior to repossession (excluding obligations of the buyer) exceeds the gain previously reported as income.[136] The taxable gain is nevertheless limited to the amount by which the original sales price exceeds the adjusted basis of the property, reduced by the sum of the gain previously reported and the amount transferred by the seller in connection with the repossession.[137] The original sales price of the property is the gross sale price less selling commissions, legal fees, unstated interest, and other related selling expenses.[138] Also, any stated or unstated interest received by the seller prior to repossession is not included in the gain previously returned as income.[139] The basis of the repossessed property is defined as the seller's adjusted basis of the purchaser's indebtedness on the date of repossession but increased by the gain recognized and the seller's repossession costs.[140]

For example, assume that a calendar year taxpayer sells real property on January 1, 1970, for $25,000, payable as follows: $5,000 down and $20,000 in 6 percent notes, secured by a deed of trust, payable in $4,000 annual installments beginning January 1, 1971. The property has a basis of $20,000 to the seller. The seller elects section 453 (b), and his gross profit percentage is 20 percent ($5,000 profit ÷ $25,000 selling price). In 1970 the seller reports $1,000 as income, and in 1971 he reports $800. The buyer defaults in 1972, and the seller repossesses the property at a cost of $500. The taxable gain upon repossession is $2,700, computed as follows:

Amount of money previously received		$ 9,000
Less: Gain previously reported		1,800
Gain without limitation		$ 7,200
Limitation:		
Original sale price		$25,000
Less: basis		20,000
		5,000
Reduced by:		
previous gain	1,800	
repossession costs	500	2,300
Taxable Gain on Repossession		$ 2,700

[136] INT. REV. CODE OF 1954, § 1038 (b) (1).

[137] *Id.* § 1038 (b) (2). Amount of money paid or transferred by the seller include: court costs; fees for attorneys, masters, trustees, and auctioneers; fees for publication; fees for acquiring title, clearing liens, or filing and recording. Treas. Reg. § 1.1038-1 (c) (4) (i) (1967).

[138] Treas. Reg. § 1.1038-1 (c) (3) (1967).

[139] *Id.* § 1.1038-1 (b) (2) (iii).

[140] INT. REV. CODE OF 1954, § 1038 (c).

The new basis in the repossessed property is $16,000, computed as follows:

Face value of purchaser's note		$16,000
Less: unreported profit		3,200
Adjusted basis of purchaser's note		12,800
Plus:		
Gain on repossession	2,700	
Cost of repossession	500	3,200
Basis of Repossessed Property		$16,000

In the case of a dealer who repossesses real property sold on the installment method, the dealer is not allowed to claim any worthless or partially worthless bad debt with respect to the indebtedness satisfied.[141] Any amount previously treated as a bad debt deduction must be treated upon repossession as a recovery of such debt and such amount must be added to the basis of the installment obligation.[142]

V. Conclusion

The installment sales provision of the Internal Revenue Code affords the vendor of real property an attractive alternative to the usual method of reporting gain in the year of sale. It is incumbent upon the practitioner to be cognizant of the requirements of section 453 (b), since it is more often the attorney, rather than the accountant, who is involved in the actual consummation of the real property sale. Any subsequent attempt to qualify a defective sale for installment reporting may be of no avail, particularly if the vendor fails to discover the qualification problem until after the close of his taxable year. It is apparent that the presence of competent tax advice at the time of sale is essential for the ultimate qualification of the transaction for the installment method of reporting.

Advantages of installment reporting, in addition to the deferred tax treatment, should be carefully examined and weighed against potential pitfalls resulting from the election of section 453 (b). For example, in the case of taxable years for individuals beginning in 1972, long term capital gains will be subjected to a maximum tax rate of 35 percent as the maximum alternative tax on capital gains is phased out.[143] Neverthe-

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[141] *Id.* § 1038 (a).

[142] *Id.* § 1038 (d).

[143] *See id.* §§ 1201 (b), (c). The 35 percent rate results from the combined effect of the 50 percent capital gain deduction under section 1202 and the 70 percent maximum rate on an individual's ordinary income.

less, the first $50,000 of long term capital gain is subject to a maximum tax rate of 25 percent.[144] Consequently, a judicious structuring of installment payments may result in capital gains being taxed at the lower tax rate. Moreover, since the portion of long term capital gains that escapes taxation under section 1202 is regarded as a tax preference item to the extent such amount exceeds $30,000,[145] the spreading of any such gain over future years may reduce the amount below $30,000 for any taxable year and thus avoid the additional 10 percent tax imposed on items of tax preference.

The spreading forward of capital gains may also prove beneficial to corporations in that such gains may be utilized to offset future unusable capital losses subject to the 5-year maximum carryover of section 1212. Against these advantages must be weighed the possibility that the seller may wish to apply the entire gain to a net operating loss[146] or capital loss carryover that is about to expire. Furthermore, the capital gains provisions are subject to change and revision by Congress — a change which might convert future installment receipts into ordinary income.[147] In addition to the above tax ramifications surrounding the installment election, the vendor seeking to utilize section 453 (b) must evaluate the financial reliability of the purchaser, the business risk of deferring gain until future years, the diluting effect of creeping inflation upon fixed payments, and the possibility of higher tax rates in the years in which installment payments are to be received.

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[144] *Id.* § 1201.

[145] *See id.* §§ 56, 57 (a) (9).

[146] *Id.* § 172.

[147] *See, e.g.*, Snell v. Commissioner, 97 F.2d 891 (5th Cir. 1938), where it was held that the law in force during the year of receipt, not the year of sale, applies.

ASSUMPTION OF RISK IN MISSISSIPPI – TIME FOR A CHANGE?

Volenti Non Fit Injuria

The often-quoted "volenti" maxim, which means "He who consents cannot receive an injury,"[1] along with its counterpart, "assumption of risk," has been a subject of frequent discussion among legal writers.[2] Although both phrases have been applied when discussing Mississippi law,[3] the Mississippi Supreme Court has never attempted to distinguish the expressions and usually speaks in terms of assumption of risk.[4]

The general principle of the assumption of risk doctrine is stated in the *Restatement of Torts* as follows: "A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."[5] Moreover, a plaintiff who has assumed a risk is *completely* barred from recovery. Thus, application of the doctrine may lead to harsh results.

It is possible to classify the doctrine into three basic situations:[6] In a primary sense, the plaintiff gives in advance his consent to relieve the defendant from a duty owed to the plaintiff. For example, assume *B* wants to ride *A's* horse. *A* tells *B* that if *B* wants to ride the horse, he must assume the risks because the horse is wild and dangerous. If *B* then rides the horse, he has *expressly* assumed the risk.[7] In a second situation, the plaintiff voluntarily enters into a relation with the defendant, and the plaintiff knows he will not be protected from a danger. For example, *B* might get on *A's* horse, which immediately starts bucking. If *B* continues to ride, he has *impliedly* assumed the risk. A third situation arises

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[1] BLACK'S LAW DICTIONARY 1746 (Rev. 4th ed. 1968).

[2] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68, at 439 n.10 (4th ed. 1971) [hereinafter cited as PROSSER].

[3] *E.g.*, Pierson v. Ray, 352 F.2d 213, 220 (5th Cir. 1965), *aff'd in part, rev'd in part,* 386 U.S. 547 (1967), which states that "[t]hroughout the common law of torts the maxim, volenti non fit injuria, is applicable." Wright v. Standard Oil Co., 319 F. Supp. 1364, 1372 (N.D. Miss. 1970), which states that "[a]ssumption of risk as a complete defense is a viable doctrine in Mississippi. . . ."

[4] *See, e.g.*, Mississippi Export R.R. v. Temple, 257 So. 2d 187 (Miss. 1972); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947); McDonald v. Wilmut Gas & Oil Co., 180 Miss. 350, 176 So. 395 (1937).

[5] RESTATEMENT (SECOND) OF TORTS § 496 A (1965).

[6] These classifications are basically derived from PROSSER § 68, at 440.

[7] Thus express consent is acknowledged in a specific agreement between the parties. Generally speaking, there is no legal prohibition against these types of agreements. Nevertheless, some agreements have been held invalid as against public policy. James, *Assumption of Risk,* 61 YALE L.J. 141, 163 (1952).

when the plaintiff is aware of a risk previously created by the defendant's negligence, yet he voluntarily chooses to encounter it. For example, *B* knows that the saddle *A* loans him is defective, but he uses it anyway. B has again assumed the risk. It is the second and third situations which create the most problems, for the plaintiff's conduct in encountering a known risk may be in itself unreasonable. If so, his conduct would constitute a form of contributory negligence rather than assumption of risk.[8]

This comment will (1) discuss the fundamental aspects of the assumption of risk doctrine; (2) compare the doctrine to the similar doctrine of contributory negligence; and (3) formulate conclusions about the current desirability of the doctrine.

I. Fundamental Aspects of the Assumption of Risk Doctrine

A. Brief History

The assumption of risk doctrine emerged from its English embryo during the early 19th century. The leading English case, *Priestly v. Fowler*,[9] was decided in 1837. Although it did not specifically label assumption of risk as a doctrine, the *Priestly* court did state that an employee must assume certain risks during the course of his employment.[10] The doctrine subsequently migrated to the United States in 1841, when the case of *Murray v. S.C.R.R.*[11] was decided. Since then, this common law doctrine has blossomed into a well-recognized defense in many states.[12] Mississippi adopted the doctrine in 1873 with the case of *N.O.,J.&G.N.R.R. v. Hughes*,[13] which involved a suit by a railroad employee who was injured when his train derailed. In denying his claim, the court stated that he had assumed the "natural and ordinary perils incident to the service."[14] Today the doctrine continues to be a viable part of Mississippi jurisprudence.[15]

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[8] Prosser § 68, at 441.

[9] 150 Eng. Rep. 1030 (Ex. 1837).

[10] [T]he mere relation of the master and servant can never imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself . . . . The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself. . . .
Id. at 1032-33.

[11] 36 Am. Dec. 268 (S.C. 1841).

[12] Some form of the doctrine is recognized in almost every state. For the current status of the doctrine in the different states, *see* note 134 *infra*.

[13] 49 Miss. 258 (1873).

[14] *Id.* at 282.

[15] *See, e.g.*, Wright v. Standard Oil Co., 319 F. Supp. 1364, 1372 (N.D. Miss. 1970).

Originally, the assumption of risk doctrine was created to protect industry from the claims of its employees. The United States Supreme Court very aptly described the inceptive purpose as follows:

> Assumption of risk is a judicially created rule which was developed in response to the general impulse of the common law courts at the beginning of this period to insulate the employer as much as possible from bearing the "human overhead" which is an inevitable part of the cost-to someone-of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry.[16]

Thus, the doctrine thrived on the rationale that the employee would be compensated for his risk and that he could always resign if he chose not to accept the risk.[17] Although the doctrine was originally limited to the employer-employee relationship, it has proliferated in other areas such as automobile accidents,[18] products liability,[19] and property ownership cases.[20]

B. Nesessary Elements

Assumption of risk may be either expressed or implied. Before the doctrine may be applied, however, certain elements must be present. Basically, the plaintiff must have "actual" knowledge of the risk,[21] and voluntarily and deliberately expose himself to the risk.[22]

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[16]Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 58-59 (1943). The Mississippi Supreme Court has expressed a similar view:

> The general principle which prevails in England, and in most of the American States, is, that a servant accepting employment for the performance of specified duties takes upon himself the natural and ordinary perils incident to the service, of which, are exposures from negligence of fellow-servants in the same common employment.

N.O.,J.&G.N.R.R. v. Hughes, 49 Miss. 258, 282 (1873).

[17]*See* note 10 *supra.*

[18]*See, e.g.,* Robbins v. Milner Enterprises, Inc., 278 F.2d 492 (5th Cir. 1960) (defective brakes); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947) (intoxicated driver).

[19]*See, e.g.,* Ward v. Hobart Mfg. Co., 317 F. Supp. 841 (S.D. Miss. 1970), *rev'd,* 450 F.2d 1176 (5th Cir. 1971) (meat grinder); Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962) (oil rig).

[20]*See, e.g.,* Langford v. Mercurio, 254 Miss. 788, 183 So. 2d 150 (1966).

[21]*E.g.,* White v. Mississippi Power & Light Co., 196 So. 2d 343 (Miss. 1967); Wallace v. J.C. Penney Co., 236 Miss. 367, 109 So. 2d 876 (1959).

[22]*E.g.,* Strand Enterprises Inc., v. Turner, 223 Miss. 588, 78 So. 2d 769 (1955). Although it is generally recognized that only the two requirements are necessary (*see* PROSSER § 68, at 447), Mississippi has sometimes divided the doctrine into three separate elements. One author separated the essential requirements as follows:

1. Knowledge of the Risk

The plaintiff's actual knowledge has been held to encompass a complete comprehension and appreciation of the danger.[23] Consequently, if the plaintiff knows of a danger, yet fails fully to appreciate the extent thereof, he cannot have knowledge. Thus, if a driver of an automobile knows that his brakes are faulty, yet does not know they are in such a condition as to cause an accident, he does not have knowledge.[24] Presumably, lack of capacity would prevent a plaintiff's total comprehension of the risk if he were an infant or a person of unsound mind. The Mississippi Supreme Court has held, however, that voluntary intoxication will not exempt a plaintiff from the doctrine.[25]

Since actual knowledge is necessary, the test employed to determine this must be a subjective one of the plaintiff himself, rather than the objective standard of the reasonable man which is used for purposes of determining contributory negligence.[26] Thus, it is not sufficient to say that the plaintiff "should have known" about the danger.[27] What is the effect, then, of the plaintiff's denial of actual knowledge? In these situations, the Mississippi Supreme Court has indicated that the circumstances may be such as to charge the plaintiff with actual knowledge.[28] Furthermore, a plaintiff may not overlook obvious dangers.[29] Similarly, an expert may be charged with a higher degree of knowledge of a dan-

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(1) knowledge on the part the of the injured party of a condition inconsistent with his safety; (2) appreciation by the injured party of the danger in the condition; and (3) a deliberate and voluntary choice on the part of the injured party to expose his person to that danger in such a manner as to register assent on the continuance of the dangerous condition.

19 Miss. L.J. 369, 370 (1948). The Mississippi Supreme Court quoted these elements with approval in Elias v. New Laurel Radio Station, Inc., 245 Miss. 170, 179, 146 So. 2d 558, 561-62 (1962). Nevertheless, "knowledge" of the danger usually incorporates "appreciation" of the risk, so that the two may be combined into one element.

[23]*See* note 22 *supra*.

[24]*See* Robbins v. Milner Enterprises, Inc., 278 F.2d 492 (5th Cir. 1960). The court went so far as to say the driver must have knowledge that "the brakes were seriously defective presenting immediate, obvious dangers." *Id.* at 496.

[25]Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947).

[26]*E.g.*, Herod v. Grant, 262 So. 2d 781 (Miss. 1972); Griffin v. Holliday, 233 So. 2d 820 (Miss. 1970); Daves v. Reed, 222 So. 2d 411 (Miss. 1969).

[27]*E.g.*, Fisher v. United States Steel Corp., 334 F.2d 904 (5th Cir. 1964).

[28]*See* United Roofing & Siding Co. v. Seefeld, 222 So. 2d 406 (Miss. 1969). In this case a plumber who was working in the area of a construction project stepped on a nail and injured his foot. The plumber testified that he had not seen the nail, but the court held he assumed the risk because he knew carpenters had been working in the area.

[29]Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962).

gerous instrumentality than an ordinary layman.[30] Therefore, the Mississippi Supreme Court has stated that if the danger is obvious or the facts are such that the plaintiff "must have had knowledge" of the risk, then the situation is "equivalent to actual knowledge."[31] Unfortunately, this "must have had knowledge" test appears to be an unhappy compromise between the subjective and objective tests and certainly necessitates a delicate distinction.

Although a plaintiff may have knowledge of a particular risk, his knowledge does not extend to a new, unknown element which changes the situation.[32] For example, if a house mover is told that an overhead power line is harmless, he does not assume the risk if the line is later found to be dangerous.[33]

In a limited number of situations, it is possible for the plaintiff to consent to the risk without ever having actual knowledge of the risk. For example, a trespasser or licensee assumes all risks (known or unknown) when he enters the land of another, since the owner is under no obligation to him other than refraining from wilful or wanton injury.[34] Thus, it is not necessary for the plaintiff to actually consent to the danger.

2. Voluntary Assumption

The second requirement for the application of the doctrine is that the plaintiff must voluntarily and deliberately encounter the risk. The plaintiff must exhibit a "manifestation of consent."[35] It should be noted, however, that walking into a known danger cannot *always* be deemed a consent. Thus, when a boy runs into a busy street, he is not consenting to be run down.[36] Yet once a party has voluntarily placed himself in a risky position, he appreciates that chance of injury so long as the dangerous condition continues.[37] Furthermore, if a party has voluntarily exposed himself to a risk, he is totally barred from recovery, even though

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[30]Thus an electrician may be held to have assumed the risks of electrocution when he works on power lines. Jackson Ready-Mix Concrete v. Sexton, 235 So. 2d 267 (Miss. 1970), *cert. denied,* 400 U.S. 916 (1970).

[31]Herod v. Grant, 262 So. 2d 781, 783 (Miss. 1972).

[32]Crouch v. Mississippi Power & Light Co., 193 So. 2d 144 (Miss. 1966). "[T]he fact that the plaintiff is fully aware of one risk does not mean that he assumes another of which he is unaware." *Id.* at 148.

[33]*Id.*

[34]*E.g.,* Coleman v. Associated Pipeline Contractors, Inc., 444 F.2d 737 (5th Cir. 1971); West v. Williams, 245 So. 2d 591 (Miss. 1971).

[35]PROSSER § 68, at 450.

[36]*Id.* According to the late Dean Prosser, this is a problem area in which the doctrine is sometimes confused with the contributory negligence doctrine.

[37]Wallace v. J. C. Penney Co., 236 Miss. 367, 109 So. 2d 876 (1959).

he may have used the utmost care thereafter.[38] In order for a party's actions to be considered voluntary, he must have a reasonable alternative to encountering the risk.[39] The plaintiff must be reasonably able to elect whether or not he shall expose himself to the danger. He must further have a reasonable opportunity to withdraw after the danger is realized. If the plaintiff accepts the risk because there is no reasonable alternative available, there has been no voluntary assumption.[40] Similarly, a plaintiff does not voluntarily assume a risk when he exercises a legal right or privilege given to him.[41]

Of course, for a defendant to plead the doctrine successfully, the plaintiff's injury must have resulted from the risk he assumed.[42] Furthermore, the application of the doctrine is generally a jury question.[43]

C. Master-Servant Relationships

The importance of the assumption of risk doctrine in the master-servant area has diminished considerably since the advent of workmen's compensation statutes. Nevertheless, the doctrine is still applicable in certain situations. Therefore, a brief look at the development of the doctrine in this area, especially the statutory development, is necessary to appreciate the present scope of its application.

1. Common Law Background

The assumption of risk doctrine was originally created at common law to protect industry from bearing the cost of "human overhead."[44] The risks that an employee might incur during the course of his employment can be divided into two classes: (1) ordinary risks not created by the master's negligence, and (2) extraordinary risks that are created by the master's negligence.[45] The general rule was that the servant assumed

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[38] Elias v. New Laurel Radio Station, Inc., 245 Miss. 170, 146 So. 2d 558 (1962).

[39] *Id.*

[40] RESTATEMENT (SECOND) OF TORTS § 496 E (1965).

[41] *Id.*

[42] Petersen v. Klos, 426 F.2d 199 (5th Cir. 1970).

[43] *E.g.*, Wright v. Standard Oil Co., 319 F. Supp. 1364 (N.D. Miss. 1970); Elias v. New Laurel Radio Station, Inc., 245 Miss. 170, 146 So. 2d 558 (1962). Indeed, the court has held it to be a jury question in all but the "clearest" cases. Daves v. Reed, 222 So. 2d 411, 414 (Miss. 1969).

[44] *See* text at note 16 *supra*.

[45] Yazoo & M.V.R.R. v. Dees, 121 Miss. 439, 83 So. 613 (1920). More specifically:

> The risks which a servant may incur in any employment fall naturally into one or the other of two classes: First, the ordinary risks of the service, that is, those which are not created by the master's negligence and which remain after he has used due care to remove them; and, second, the extraordinary risks or those which are created by the master's negligence.

Id. at 463, 83 So. at 615.

only the *ordinary* risks of his employment.[46] Thus, the employee assumed the risks of the tools and appliances with which he worked.[47] As always, however, the general rule was not consistently applicable. It was also held that the servant did assume the risks of the master's negligence if he (1) had actual knowledge of the danger; (2) appreciated the danger; and (3) voluntarily continued his employment.[48] Moreover, it was generally held that the servant assumed the risks of dangers created by his fellow servants.[49] The servant did not assume the risks of his fellow servants' negligence, however, if the master's negligence was primarily responsible for the injury. For example, the servant could still recover if: (1) the master did not use ordinary care in his selection of the other servants; (2) the master had actual notice of the fellow servant's unfitness, but continued his employment; or (3) the master should have known, by the use of reasonable diligence, about the fellow servant's unfitness.[50]

2. Statutory Development

Congress modified the common law doctrine in 1908 with the enactment of the Federal Employer's Liability Act.[51] Designed to protect employees of common carriers, this statute eliminated the fellow servant rule and substituted comparative negligence for contributory negligence, but retained the doctrine of assumed risk.[52] In effect, then, the doctrine

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[46]Thus the servant could not recover if injured by ordinary dangers. *Id.* at 464, 83 So. at 615; *accord,* N.O.,J.&G.N.R.R. v. Hughes, 49 Miss. 258 (1873):

> The general principle which prevails in England, and in most of the American States, is, that a servant accepting employment for the performance of specified duties takes upon himself the natural and ordinary perils incident to the service . . . .

Id. at 282.

[47]Howd v. Mississippi Cent. R.R., 50 Miss. 178 (1874). The employee assumed the risk of both ordinary and dangerous instrumentalities. It was the duty of the master, however, to use reasonable care in providing safe instrumentalities. Thus the servant would not assume the risk of a defective instrument negligently provided by the master. *Id.* at 186.

[48]Yazoo & M.V.R.R. v. Dees, 121 Miss. 439, 464, 83 So. 613, 615 (1920).

[49]Howd v. Mississippi Cent. R.R., 50 Miss. 178 (1874); N.O.,J.&G.N.R.R. v. Hughes, 49 Miss. 258 (1873). This is generally known as the "fellow servant" rule.

[50]Howd v. Mississippi Cent. R.R., 50 Miss. 178, 189 (1874); *accord* N.O.,J.&G.N.R.R. v. Hughes, 49 Miss. 258, 284 (1873).

[51]Act of April 22, 1908, ch. 149, § 4, 35 Stat. 66.

[52]*See* 45 U.S.C.A. § 54, note 1 at 125 (1972); Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 62 (1943).

was applied as at common law.[53] In 1939, however, the Federal Employer's Liability Act was amended.[54] After the amendment, the employee was held not to assume risks of employment caused by the employer's negligence,[55] therefore for all practical purposes, the doctrine of assumption of risk was abolished in cases arising under the Act.[56] The Federal Employer's Liability Act governed all cases falling within its provisions; consequently it superseded state law, including both statutory and common law.[57] Presumably, in cases unaffected by workmen's compensation statutes, the Act is still valid.

Mississippi's initial modification of the doctrine appeared in the Constitution of 1890. This provision, which affected only railroad corporations and employees, provided generally that an employee's knowledge of unsafe machinery defects would not bar him from recovery in a negligence suit.[58] In 1914, the assumption of risk doctrine was generally abolished by statute in all cases which resulted from an employer's negligence.[59] The statute specifically provided:

> [I]n all actions for personal injury to an employee, and in all actions where such injury results in death, such employee shall not be held to have assumed the risk of his employment in any case where such injury or death results in whole or in part from the negligence of the master. . . .[60]

Thus, the statute extended protection to all employees, not just railroad employees. This law was embodied in the 1917 *Hemingway's Code*,[61] and remains unchanged in the current Code.[62]

Although the Mississippi Supreme Court has stated that "the doctrine of assumption of the risk is not in force as between a master and

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[53]New Orleans Great N.R.R. v. Branton, 167 Miss. 52, 146 So. 870 (1933), *cert. denied*, 290 U.S. 667 (1933). *See* Illinois Cent. R.R. v. Humphries, 170 Miss. 840, 155 So. 421 (1934); Louisville & N.R.R. v. Russell, 164 Miss. 529, 144 So. 478 (1932).

[54]Act of August 11, 1939, ch. 685, § 1, 53 Stat. 1404.

[55]45 U.S.C. § 54 (1970).

[56]Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 64 (1943), declared: "The result is an Act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk ever existed."

[57]56 C.J.S. *Master and Servant* § 359 (1948).

[58]Miss. Const. art. 7, § 193.

[59]Act of Feb. 28, 1914, ch. 156, § 1, [1914] Gen. Laws Miss. 200.

[60]*Id.* Presumably, the reasoning behind this modification was that the employee does not really have a choice as to whether he wants to assume the risk. In other words, the choice between doing hazardous work or quitting one's job is no choice at all, for in most instances, the employee has to work in order to live. Furthermore, finding a new job may prove to be a difficult task.

[61]Miss. Ann. Code § 504 (Hemingway 1917).

[62]Miss. Code Ann. § 1456 (1956).

servant,"[63] a more correct statement would be that the doctrine is not in force as between master and servant when the injury results from the *master's negligence*.[64] Consequently, an employee still assumes ordinary risks not caused by the employer's negligence.[65] It should be remembered that the doctrine applies only in cases not covered by workmen's compensation.

3. Workmen's Compensation

As a practical matter, Mississippi's workmen's compensation laws have almost eliminated the problem of assumption of risk in master-servant cases. The statute provides that in the event of an injury to an employee, compensation is payable to him without regard to fault.[66] The statute further designates the class of employers who must comply with the statute.[67] Another section provides for the liability of a qualified employer to pay compensation under the Workmen's Compensation Act exclusive of all other liability.[68] Moreover, if the employment is covered under the Act, the employee's exclusive remedy is under the Act, and a suit at common law will be dismissed.[69] The purpose of the work-

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[63]Smith v. Jones, 220 So. 2d 829, 833 (Miss. 1969); *accord,* Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947); McDonald v. Wilmut Gas & Oil Co., 180 Miss. 350, 176 So. 395 (1937).

[64]MISS. CODE ANN. § 1456 (1956).

[65]Holliday v. Fulton Band Mill, Inc., 142 F.2d 1006 (5th Cir. 1944); Goff v. Randall, 206 Miss. 178, 39 So. 2d 881 (1949) ("A workman assumes the usual and ordinary risks incident to his employment, after the master has exercised reasonable care to furnish reasonably safe methods and appliances for doing the work." 206 Miss. at 188, 39 So. 2d at 881). Moreover, *Holliday* notes certain duties an employer owes to his employees. These include: (1) providing a reasonablly safe place to work; (2) furnishing reasonably safe tools and appliances; (3) using reasonable care in hiring other employees; (4) warning the inexperienced employee of unknown dangers; and (5) if the work is complex, organizing the work and making it as safe as possible by enforcing the rules. 142 F.2d at 1007. Thus, the master will be negligent if he fails to perform any of these duties, and the servant will not be barred from recovery if his injury results from this negligence.

[66]MISS. CODE ANN. § 6998-04 (Supp. 1972).

[67]Generally, the Act is applicable to any employer, whether a person, firm, or corporation, who has in his service five or more workmen in the same business. *Id.* § 6998-03.

[68]*Id.* § 6998-05 (1952). However, if the employer fails to comply with the Act and provide compensation as required, the employee has a choice between two remedies: (1) claiming compensation under the Act, or (2) suing for damages in a court of law. Should the employee decide to sue at law, the employer is prohibited from pleading assumption of risk or contributory negligence as a defense. *Id.*

[69]L. B. Priester & Son, Inc. v. Bynum's Dependents, 244 Miss. 185, 142 So. 2d 30 (1962); Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (1954). It has been furth-

men's compensation statutes is to give definite economic relief without regard to fault to the injured employee, while relieving the employer from the possibility of common law actions.[70]

Of course, in cases which do not qualify under the statute, the common law principles of assumption of risk apply.[71] Thus, the doctrine is still applicable in controversies between an employer and an independent contractor.[72]

D. Automobile Accidents: Host-Guest Relationship

When automobile accidents occur, a host-guest relationship is often involved. The general rule is that the guest assumes all the ordinary risks incident to travel in a motor vehicle.[73] Thus, the guest would assume the ordinary risk of a tire blowout.[74] The guest does not, however, assume the risks caused by the negligent operation of a vehicle over which he has no control.[75] Conversely, the guest will assume risks of the driver's negligence if the guest does have control over the vehicle. The Mississippi court has held that one who knowingly rides with a drunken driver, but who admits that she could have taken over the driving, has assumed the risk.[76] The control requirement is easily analogized to the voluntary element required for assumption of risk. If the guest has control over the operation of the vehicle to the extent that he could stop it, take over its operation, or refuse to ride, then his choice of remaining in the vehicle is voluntary and he assumes the risk.

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er held that liability under the Act will not be judged by common law principles. Barry v. Sanders Co., 211 Miss. 656, 52 So. 2d 493 (1951).

[70]V. DUNN, MISSISSIPPI WORKMEN'S COMPENSATION § 2 (2d ed. 1967):

> It takes from the employee and his dependents the common law action in tort and substitutes a measure of fixed economic relief for accidental industrial injuries without reference to negligence or fault as to the cause of the injury. On the other hand, it relieves industry from the risk of common law actions and substitutes an assumption of risk for all covered accidents, within prescribed monetary limits, regardless of negligence or fault from the causative viewpoint.

[71]*See* May v. Vardaman Mfg. Co., 244 Miss. 261, 142 So. 2d 18 (1962).

[72]United Roofing & Siding Co. v. Seefeld, 222 So. 2d 406 (Miss. 1969).

[73]Gregory v. Thompson, 248 Miss. 431, 160 So. 2d 195 (1964); Junkins v. Brown, 238 Miss. 142, 117 So. 2d 712 (1960).

[74]Monsour v. Farris, 181 Miss. 803, 181 So. 326 (1938) (the tire had traveled 17,000 miles and had no apparent defects).

[75]Gregory v. Thompson, 248 Miss. 431, 160 So. 2d 195 (1964); Hatcher v. Daniel, 228 Miss. 196, 87 So. 2d 490 (1956).

[76]Morris v. Lammons, 243 Miss. 684, 139 So. 2d 867 (1962). By the same theory, most courts have held a passenger who rides with a speeding driver, and who does not protest, is guilty of contributory negligence. Rice, *The Automobile Guest and the Rationale of Assumption of Risk*, 27 MINN. L. REV. 323, 347 (1943).

By far, the majority of automobile accident cases in which the assumed risk doctrine is applied involve intoxicated drivers.[77] As a general rule, if the guest knows of the driver's intoxicated condition yet voluntarily continues to ride, he has assumed the risk of injury caused by the driver's intoxication.[78] Difficulties arise, of course, when establishing the required elements. The Mississippi Supreme Court has stated that the knowledge element would be satisfied if the driver was obviously drunk and his intoxicated condition could not escape the knowledge and observation of the plaintiff.[79] It is not enough, however, that the plaintiff should have known about the driver's intoxication; he must have actual knowledge.[80] Proving the voluntariness of the plaintiff's consent is another problem area. It should be recalled that the plaintiff must have a reasonable alternative if his conduct is to be considered voluntary.[81] The availability of such an alternative would be difficult to prove if the plaintiff's only option is abandoning the car many miles from home.[82]

In addition, the driver's negligent acts may sometimes be imputed to the passenger.[83] As a result, the passenger may also be denied recovery against a third party (not the host) because of imputed negligence.[84]

E. Other Applications

The doctrine is not limited in application to automobile accidents and employment hazards; it has evolved into other areas as well. For ex-

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[77]Pedrick, *Taken for a Ride: The Automobile Guest and Assumption of Risk*, 22 LA. L. REV. 90, 94 (1961). *See* Griffin v. Holliday, 233 So. 2d 820 (Miss. 1970); Morris v. Lammons, 243 Miss. 684, 139 So. 2d 867 (1962); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947); Chapman v. Powers, 150 Miss. 687, 116 So. 609 (1928).

[78]*See, e.g.*, Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947). The same rationale apparently applies in cases where "sleepiness" rather than "drunkenness" is a factor. *See* Gower v. Strain, 169 Miss. 344, 145 So. 244 (1933).

[79]Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947).

[80]Griffin v. Holliday, 233 So. 2d 820 (Miss. 1970).

[81]*See* text at note 39 *supra*.

[82]*See* Baird v. Cornelius, 12 Wis. 2d 284, 107 N.W.2d 278, 286 (1961) (concurring opinion).

[83]Rice, *supra* note 77, at 459.

[84]Chapman v. Powers, 150 Miss. 687, 694, 116 So. 609, 611 (1928):

> If it is manifest that the host, from drunkenness, or other cause, is unfit to drive the car, and that his driving will endanger the life and limbs of others, and the guest is aware of that condition of affairs, and voluntarily rides in the car with such a host, the negligence of the latter becomes the negligence of the guest.

Id. at 694, 116 So. at 611.

ample, the owner of property owes no duty to a trespasser or licensee other than refraining from willful and wanton injury.[85] The property owner has no duty to warn of known or obvious conditions,[86] therefore, the licensee must generally assume the risk of whatever he encounters.[87] Thus, a licensee who enters the land of another with knowledge of a large open ditch, assumes the risks it creates.[88] In addition, although a landowner owes business invitees the duty to keep the premises in a reasonably safe condition, he is generally not liable for injuries caused by obvious or known conditions.[89] Consequently an invitee may assume a risk by knowing and appreciating the danger and by deliberately exposing himself to it.[90]

Another potential area for the application of the doctrine is that of products liability. The general rule here is that if the product defect or dangerous condition is open or obvious, the manufacturer owes the consumer no duty and is not liable for damages.[91]

Finally, the courts have held the doctrine to be applicable to a suit for false imprisonment,[92] but have refused to apply the doctrine to hunting accidents.[93]

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[85]Coleman v. Associated Pipeline Contractors, Inc., 444 F.2d 737 (5th Cir. 1971); West v. Williams, 245 So. 2d 591 (Miss. 1971).

[86]PROSSER § 60, at 376.

[87]*Id.*

[88]McDonald v. Wilmut Gas & Oil Co., 180 Miss. 350, 176 So. 395 (1937); *accord,* Langford v. Mercurio, 254 Miss. 788, 183 So. 2d 150 (1966) (licensee familiar with area around launderette assumed risk of falling off loading ramp).

[89]General Tire & Rubber Co. v. Darnell, 221 So. 2d 104 (Miss. 1969); Stanley v. Morgan & Lindsey, Inc., 203 So. 2d 473 (Miss. 1967).

[90]Strand Enterprises, Inc. v. Turner, 223 Miss. 588, 78 So. 2d 769 (1955) (invitee who did not know about hole in floor held not to assume risk).

[91]Ward v. Hobart Mfg. Co., 317 F. Supp. 841 (S.D. Miss. 1970), *rev'd,* 450 F.2d 1176 (5th Cir. 1971); Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962). Although the district court in *Ward* ruled as a matter of law that the doctrine of assumed risk was not applicable (317 F. Supp. at 853), the court of appeals gave more weight to the "obviousness" factor and held that an obvious defect bars recovery. 450 F.2d at 1186.

[92]Pierson v. Ray, 352 F.2d 213 (5th Cir. 1965), *aff'd in part, rev'd in part,* 386 U.S. 547 (1967). "One who has invited or consented to arrest and imprisonment should be denied recovery." 352 F.2d at 220.

[93]Shurley v. Hoskins, 271 So. 2d 439 (Miss. 1973). The plaintiff, who was hunting turkeys, was shot and injured by one of his fellow hunters. The court stated: "In short, a member of a hunting party does not assume the risk that one of his fellow hunters will negligently discharge his firearm." *Id.* at 444.

II. Comparison of Assumption of Risk with Contributory Negligence

Assumption of risk is often confused with contributory negligence. The overlapping area generally involves a plaintiff whose actions in encountering a known risk may be unreasonable.[94] Thus if the dangers assumed are significantly disproportionate to the plaintiff's conduct, his actions may constitute contributory negligence, rather than assumption of risk. In other words, contributory negligence sometimes "consists in making the wrong choice and voluntarily encountering a known unreasonable risk."[95] It is obvious how this could be confused with assumption of risk.

While the problem of distinguishing assumption of risk from contributory negligence has not gone unnoticed in Mississippi,[96] the matter is still unresolved. This section will highlight distinctions and provide insights to one very basic, yet extremely important question: Does the assumption of risk doctrine do violence to the legislative intent of Mississippi's comparative negligence statute?

A. Introduction to Mississippi's Comparative Negligence Statute

The Mississippi Supreme Court has defined contributory negligence as follows:

> Contributory negligence arises when, but not until, the injured person by his own conduct has done something, or has omitted to do something, which contributes to the particular event, and at the particular time and place, which was the immediate cause of the injury.[97]

Assumption of risk frequently overlaps with contributory negligence. In many states the distinction between the two doctrines is immaterial, as both absolutely bar recovery by the plaintiff.[98] In Mississippi, however, the distinction becomes crucial, since Mississippi has a "pure" comparative negligence statute.[99] This statute provides, in effect, that in actions brought for personal injuries or injury to property, if the injured person

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[94]Prosser § 68, at 440-41.

[95]*Id.* at 441.

[96]Shell & Bufkin, *Comparative Negligence in Mississippi,* 27 Miss. L.J. 105 (1956); Wade, *Some Recent Changes in the Law of Torts,* 38 Miss. L.J. 565 (1967). *See* Note, *Torts-Effect of Mississippi's Comparative Negligence Statute on Other Rules of Law,* 39 Miss. L.J. 493 (1968).

[97]Saxton v. Rose, 201 Miss. 814, 823, 29 So. 2d 646, 649 (1947).

[98]Prosser § 68, at 441.

[99]Maraist & Barksdale, *Mississippi Products Liability — A Critical Analysis,* 43 Miss. L.J. 139, 146 (1972).

or property owner was contributorily negligent, he will not be *completely* barred from recovery.[100] Instead, "damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property. . . ."[101] Another statute provides that "[a]ll questions of negligence and contributory negligence shall be for the jury to determine."[102] Thus, while the doctrine of assumed risk will completely bar recovery by the plaintiff, he would be only partially restricted if his conduct amounts to contributory negligence.

Mississippi's comparative negligence statute was enacted in 1910. It applies only to contributory negligence — assumption of risk is not mentioned. One must question, therefore, the intent of the legislature in omitting the assumption of risk principle from the comparative negligence statute. Did the legislature intend to retain a defense which would completely bar recovery, or did they merely fail to realize the doctrine's potential? An examination of the cases reveals that the only assumption of risk problems Mississippi faced in 1910 were in the master-servant area. Furthermore, in 1914, assumption of risks caused by the master's negligence was abolished by statute.[103] Thus, it appears that at the time the comparative negligence statute was passed, the legislature was cognizant only of the doctrine's adverse effects in the area of the master-servant relationship, an area which was subsequently modified. The question may now be posed: Had the legislature known of the future extensions of the assumed risk doctrine, would they have limited it as they limited contributory negligence? As the late Dean Prosser stated in his discussion of the subject:

> In all probability this defeats the basic intention of the [comparative negligence] statute, since it continues an absolute bar in the case of one important, and very common, type of negligent conduct on the part of the plaintiff. It can scarcely be supposed in reason that the legislature has intended to allow a partial recovery to the plaintiff who has been so negligent as not to discover his peril at all, and deny it to one who has at least exercised proper care in that respect, but has made a mistake of judgement in proceeding to encounter the danger after it is known.[104]

Other sources have expressed similar views.[105] Consequently, the re-

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[100] MISS. CODE ANN. § 1454 (1956).

[101] *Id.*

[102] *Id.* § 1455.

[103] Act of Feb. 28, 1914, ch. 156, § 1, [1914] Gen. Laws Miss. 200.

[104] PROSSER § 68, at 457.

[105] RESTATEMENT (SECOND) OF TORTS § 496 A, comment *d* at 563 (1965):

> It would appear that, unless such a construction is clearly called for, it defeats the intent of the statute in any case where the same conduct constitutes

mainder of this comment should be viewed with this basic inquiry in mind.

B. Judicial Distinction Between Assumption of Risk and Contributory Negligence

Of primary importance is the task of determining the correct category in which to assign the plaintiff's conduct. Again, the emphasis will be on those areas in which either assumption of risk or contributory negligence appears to be applicable. The most common example of this difficult area is that of the plaintiff who walks into a busy street. At first glance it would appear that the plaintiff has voluntarily encountered a known risk. Yet the courts generally hold otherwise, stating that the plaintiff has not consented to being hit; rather, he has demanded that the drivers use care. This is a form of contributory negligence.[106]

In attempting to distinguish the two doctrines, the Mississippi Supreme Court has tersely labeled assumption of risk as "venturousness" and contributory negligence as "carelessness."[107] More specifically, the court has declared that assumption of risk involves "a mental state of willingness to deliberately venture forth into a situation containing dangers which are fully known and appreciated by the plaintiff," whereas contributory negligence implies "the absence of a deliberate choice and an intelligent realization of the risk presented by a given situation. . . ."[108] Furthermore, the court has frequently acknowledged that assumption of

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both contributory negligence and assumption of risk, since the purpose of the act would appear to be to reduce the damages in the case of all such negligent conduct, whatever the defense may be called.

Pedrick, *supra* note 78, at 98:

> Whatever the criterion for apportioning damages, however, the legislature in those jurisdictions where comparative negligence has been adopted has made plain its desire that plaintiffs not be barred from recovery because of their contributory fault.
>
> In the face of this legislative prescription it would be a shocking thing if one class of cases were singled out by the courts as ineligible for this damage apportionment treatment.

[106]PROSSER § 68, at 445. *See* Wright v. Standard Oil Co., 319 F. Supp. 1364 (N.D. Miss. 1970). In *Wright* a young child, while attempting to cross a heavily traveled highway, was struck and injured by a gasoline truck. The defense pleaded assumption of risk because the child was left across the street by his father, who knew the road was busy. The court, nevertheless, rejected the assumption of risk contention by stating that the father did not have "actual knowledge of negligent vehicular operation by third parties which would increase the danger to his child beyond that posed by ordinary traffic hazards." *Id.* at 1373. The court added, however, that the father might have been contributorily negligent.

[107]Saxton v. Rose, 201 Miss. 814, 823, 29 So. 2d 646, 649 (1947); *accord*, Mississippi Export R.R. v. Temple, 257 So. 2d 187, 190 (Miss. 1972).

[108]Shurley v. Hoskins, 271 So. 2d 439, 443 (Miss. 1973).

risk is governed by a subjective standard, whereas contributory negligence is tested by an objective standard of the reasonable man.[109] As a result, the correct classification is generally grounded on the extent of the plaintiff's knowledge. If the plaintiff did not actually know about the danger, but, as a reasonable man, should have known about it, then he has been careless and therefore contributorily negligent. On the other hand, if the plaintiff actually knew about the risk, his conduct is venturous, and thus he assumes the risk.

C. Analysis and Comparison of Cases Based On Assumption of Risk and Contributory Negligence

Although the courts have attempted to define the dissimilarities of the doctrines, it becomes necessary to inspect the cases more closely in order to determine the true distinctions. Therefore, the following four sections analyze several cases involving both assumption of risk and contributory negligence.

1. The Knowledge Requirement

As noted in an old case, "Knowledge of the risk is the watchword of . . . assumption of risk. . . ."[110] Hence the plaintiff's knowledge will determine whether he has assumed a risk and will be completely barred from recovery, or whether he has been merely contributorily negligent and will be allowed partial recovery. Generally speaking, Mississippi cases have held that actual knowledge of the risk is necessary.[111] If actual knowledge is required, however, why doesn't every plaintiff recover who testifies under oath that he had no knowledge of the danger? Certainly the first advice a lawyer would offer his client in such a situation would be to keep quiet and admit nothing. The Mississippi Supreme Court has solved this dilemma by declaring that actual knowledge may be proved from the circumstances.[112] Similarly, the court has stated that the plaintiff may not overlook obvious dangers.[113] As a result, the most critical part of the case is usually the proof of the circumstances.

Since knowledge may be proved from the circumstances, it is necessarily more difficult for the courts to retain the completely subjective test that is necessary for knowledge. Consider, for example, the case of

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[109] *See* note 26 *supra.*

[110] Cincinnati, N.O. & T.P. Ry. v. Thompson, 236 F. 1, 9 (6th Cir. 1916).

[111] *See* note 21 *supra.*

[112] *See* text at notes 28 and 31 *supra.*

[113] *See* Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962).

Herod v. Grant,[114] in which the plaintiff was injured while hunting deer from the back of a pickup truck at night. The Mississippi court first noted that the knowledge factor is governed by a subjective standard. Nonetheless, the court admitted that when the facts are such that the plaintiff "must have had knowledge" of the risk, the situation is then "equivalent to actual knowledge."[115] Thus, the test has evolved from *the plaintiff must actually know of the danger* to *the circumstances are such that any person of ordinary intelligence must have known of the danger*. From a practical standpoint, this test appears to be dangerously approaching the objective standard required for contributory negligence. Is "must have known" so different from "should have known" that the injured party should be *absolutely* barred from recovery? If not, then has not the intent of the damage-apportionment statute been thwarted?

2. Automobile Defect Cases

Since circumstances are critical to a determination of whether the plaintiff assumes a risk, it should be helpful to examine two similar automobile defect cases and the circumstances involved in each.

In *Robbins v. Milner Enterprises, Inc.*,[116] the plaintiff was injured when the brakes of his automobile locked and the vehicle overturned. The plaintiff testified that the brakes had been recently repaired, but that the car had been "pulling" or "grabbing" slightly during his drive. The Fifth Circuit Court of Appeals rejected the assumption of risk contention, stating that for the doctrine to be applied, the plaintiff must have had knowledge that "the brakes were seriously defective presenting immediate, obvious dangers. . . ."[117] The court reasoned that since the car had traveled over 150 miles without any "serious manifestations" of trouble, the plaintiff could assume the car to be safe.[118]

In contrast, consider the case of *Runnels v. Dixie Drive-It-Yourself System Jackson Co.*[119] in which a defective front end in the plaintiff's automobile caused an accident. Testimony indicated the automobile experienced a serious "shimmying" in the front end. The Mississippi Su-

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[114]262 So. 2d 781 (Miss. 1972).

[115]*Id.* at 783. The court cited with approval 1 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 64.3 (3rd ed. 1965), which states that when a plaintiff claims that he did not understand the risk "the courts have indicated a willingness to override such contentions of plaintiff where they find that any person of ordinary intelligence must, as a matter of law, have known and appreciated the risk." *Id.* at 540.

[116]278 F.2d 492 (5th Cir. 1960).

[117]*Id.* at 496.

[118]*Id.*

[119]220 Miss. 678, 71 So. 2d 453 (1954).

preme Court in this case, however, applied the assumed risk doctrine stating that the plaintiff's prior experience with the "shimmying" problem charged him with knowledge of a serious danger. Thus, in *Robbins* the circumstances did not evince a serious danger, so there was no bar (other than contributory negligence) to recovery. In *Runnels*, however, serious danger was noted, and recovery was denied. Although the cases are distinguishable, the distinctions do not appear so unquestionable that one party should be *completely* barred from relief.

For example, would not the *Robbins* court have been justified in declaring the defective brakes to be a serious danger? Since the brakes had been previously inoperable and were supposedly repaired in a garage, but still did not function properly, could these facts have alerted a reasonable person to serious danger? Indeed, are not defective brakes *always* serious? Suppose, furthermore, that the plaintiff had testified the brakes pulled "sharply" instead of "slightly." Would this testimony indicate a serious defect? If so, should this alter the case to such an extent as to bar the plaintiff completely from recovery?

On the other hand, if the plaintiff in *Runnels* had no prior experience with shimmying could he correctly be charged with knowledge of a serious defect? Furthermore, who is to say that a shimmying front end is inherently more dangerous than defective brakes? It appears the doctrine of assumed risk could have been applicable in either case, but the *Robbins* court more properly classified the problem under contributory negligence. Again, did the legislature intend for close cases such as these to have diverse results?

3. Employment Hazard Cases

Most cases involving employee injury are covered by workmen's compensation statutes. Nevertheless, these statutes do not always protect an employee when his injury results from the negligence of someone other than his employer. *White v. Mississippi Power & Light Co.*,[120] concerns an injury to a county road employee. The plaintiff was working near the boom of a dragline when it suddenly struck and knocked down some high voltage wires which seriously burned him. Testimony confirmed that the plaintiff had previously been warned about the dangerous power lines. He was further advised to stay on the dragline or away from it when the boom was near the power lines. From all outward appearances, this would appear a suitable case in which to apply the assumption of risk doctrine: the plaintiff had actual knowledge of the danger, he appreciated the risk, and he voluntarily ignored the

[120] 196 So. 2d 343 (Miss. 1967).

warnings and continued to work in a dangerous area. Yet the Mississippi Supreme Court refused to apply the doctrine, and offered no specific reason for its conclusion. From the text it appears the court declined to apply the doctrine in this type case simply because of the harsh consequences to the plaintiff. The court avowed:

> It is a rare case, indeed, where one who is under no contractual relationship requiring him to assume the ordinary risk of his occupation—but who knowingly consents to assume the risk of electrocution or injury from some other deadly agency calculated to destroy him—acts in such a venturesome manner as to bring into operation the legal doctrine of *volenti non fit injuria* as a defense in a suit for his injury.[121]

Although the court's approach to the case may be equitable, would not the application of the assumed risk doctrine have been justified? All elements of the doctrine were present, and the plaintiff had a simple alternative to avoid the danger. The instant court's attitude reflects a reluctance to apply the doctrine under these circumstances, and it appears their reasoning could prevail in most other assumption of risk cases as well.

4. Intoxicated Driver Cases

Perhaps the most notorious cases in which the doctrine is applied are those involving an intoxicated automobile driver. Generally speaking, an automobile passenger assumes the risk of dangers created by the intoxicated driver.[122] The passenger, of course, must know of the driver's intoxicated condition and he must voluntarily incur that risk.[123] Actual knowledge may be presumed if the driver's intoxicated condition is obvious.[124] The courts, therefore, generally rely on the circumstances to determine obvious intoxication. Significant factors to consider include the driver's actions and statements, and the amount of alcohol he has consumed. For instance, in *Petersen v. Klos,*[125] the testimony was controverted as to how much beer the driver had actually consumed. Consequently, there was insufficient evidence to prove obvious intoxication. Needless to say, the quantity of alcohol a person has absorbed is not a consistently accurate determinate. Other factors, such as the length of

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[121]*Id.* at 353.

[122]*E.g.*, Griffin v. Holliday, 233 So. 2d 820 (Miss. 1970); Morris v. Lammons, 243 Miss. 864, 139 So. 2d 867 (1962); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947).

[123]*E.g.*, Morris v. Lammons, 243 Miss. 684, 139 So. 2d 867 (1962); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947).

[124]Morris v. Lammons, 243 Miss. 684, 139 So. 2d 867 (1962).

[125]426 F.2d 199 (5th Cir. 1970), *amended,* 433 F.2d 911 (5th Cir. 1970).

the drinking period and the alcoholic tolerance of the individual, should be considered.

With these facts in mind, consider once again the passenger's knowledge. How often does the passenger know that the driver is so drunk that he is unable to drive safely? For example, judge the significance of these statements:

> "I thought he was just putting on a show;"
> "I didn't *really* think he was drunk;"
> "I knew he had drunk a lot, but I still thought he could drive;" or
> "We've gone drinking like this hundreds of times before and never had an accident."

Theoretically, would not any of these statements be sufficient to deny *true* knowledge and appreciation of the risk and thus prohibit the application of the doctrine?

The voluntariness element is also essential. If the passenger protests the driver's actions, would his ride remain a voluntary one? In one Mississippi case the plaintiff was relieved from the operation of the doctrine because he testified: "he [the driver] slowed down and I thought he was going to stop, but he kept on going."[126] The court held that this testimony rendered his actions involuntary. Assuming no other guests were in an automobile, then, could a passenger not protect himself by testifying simply that he *told* the driver to let him drive, but that the driver refused; or that he *thought* the driver was going to stop and let him drive?

Furthermore, alternatives available to the passenger play a significant role. If the passenger has no reasonable alternative, his acceptance of the ride is not voluntary.[127] Thus, recovery might be dependent upon

> the vigor of a wife's protests to her husband, or her failure to leave the car many miles from home, or whether a fifteen year old girl sufficiently protests against the reckless driving of an intoxicated driver and asks to be let out of the car. . . .[128]

Similarly, is the alternative of "abandoning ship at some remote spot" really an alternative?[129] Moreover, should recovery have to depend on the occurrence of one of these dilemmas?[130] Once again, a more equitable result should be reached in a comparative negligence jurisdiction.

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[126]Canton Broiler Farms, Inc. v. Warren, 214 So. 2d 671, 676 (Miss. 1968).

[127]*See* text at notes 39 and 40 *supra.*

[128]Baird v. Cornelius, 12 Wis. 2d 284, 107 N.W.2d 278, 286 (1961).

[129]Pedrick, *supra* note 77, at 99.

[130]The Wisconsin Supreme Court, when confronted with this problem, stated, "A rule of law which makes complete denial of recovery dependent upon the vigor of a wife's protests . . . is one which is open to question and ought to be re-examined."

III. Conclusions

A. The "Real" Uses of the Doctrine

It has been argued that the assumption of risk doctrine causes confusion by duplicating other doctrines, and that it denies recovery in cases of genuine hardship.[131] It has been further contended that cases under the doctrine would be more precisely settled by reference to the concepts of "duty" and "contributory negligence."[132] As a result, many legal writers favor abolition of assumption of risk.[133] Moreover, several states have either partially or totally abolished the doctrine.[134] The fol-

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Baird v. Cornelius, 12 Wis. 2d 284, 107 N.W.2d 278, 286 (1961). Another author expresses a similar view that "to charge the plaintiff with an agreement to accept a risky driver when the alternative was to abandon ship at some remote spot simply discounts the duress that situations and relationships can exert." Pedrick, *supra* note 77, at 99.

[131]Prosser § 68, at 454.

[132]*See* Rice, *supra* note 77, at 460, 467; Wade, *The Place of Assumption of Risk in the Law of Negligence,* 22 La. L. Rev. 5, 14 (1962).

[133]*E.g.,* 2 F. Harper & F. James, Jr., The Law of Torts 1191 (1956). "Except for express assumption of risk . . . the term and the concept should be abolished." Green, *Assumed Risk as a Defense,* 22 La. L. Rev. 77, 89 (1961):

> The ease of convertibility of one defense into some other makes the choice of defensive theory largely a matter of professional taste. The best usage is the one that most sharply focuses the defensive facts. Assumed risk is usually too blunt and too comprehensive to serve a function in a highly developed adversary process.

Id. Rice, *supra* note 77, at 467:

> Logically, it [assumption of risk] seems clearly unjustifiable, not only because it is impossible to make any conceptual distinction between the rule and that of contributory negligence, but because the standard of conduct under each doctrine seems essentially to have been the same, and the variance in the effect of such conduct when conditioned by other legal principles impinging upon one doctrine or the other has on the whole been unfortunate.

Id. Wade, *The Place of Assumption of Risk in the Law of Negligence,* 22 La. L. Rev. 5, 14 (1961):

> Accurate analysis in the law of negligence would probably be advanced if the term were eradicated and the cases divided under the topics of consent, lack of duty, and contributory negligence.

Id.

[134]Leavitt v. Gillaspie, 443 P.2d 61, 68 (Alaska 1968) (the court disapproved of the concept of assumption of risk); Fawcett v. Irby, 92 Idaho 48, 436 P.2d 714, 720 (1968) (concurring opinion) (retained the doctrine in master-servant relationship and in express contract situations); Parker v. Redden, 421 S.W.2d 586, 592 (Ky. 1967) (abolished completely); Felgner v. Anderson, 375 Mich. 23, 133 N.W.2d 136 (1965) (retained in master-servant cases); Bolduc v. Crain, 104 N.H. 163, 181 A.2d 641, 644 (1962) (assumption of risk not available as defense in common law tort action); McGrath v. American Cyanamid Co., 41 N.J. 272, 196 A.2d 238 (1963) (abolished completely); Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971) (assumption of risk no longer a defense; now covered by law on negligence and contributory negligence).

lowing is offered as a discussion of the "real" uses of the doctrine and the problems which would logically ensue if the doctrine were abrogated.

1. Discourages Disfavored Conduct

It is interesting to note that the doctrine is often introduced in cases where the conduct of the participants is frowned upon by the courts and the public.[135] For example, the courts have historically barred recovery to passengers who ride with intoxicated drivers.[136] It has been suggested that the courts are expressing their disapproval of the plaintiff's participation in foolhardy conduct.[137] Admittedly, public policy is served by discouraging rash behavior. If the assumption of risk doctrine is to be applied consistently, however, the moralistic atmosphere of the conduct should not be relevant. For instance, in *Herod v. Grant*,[138] the plaintiff was hunting deer at night from the back of a pickup truck. During the ride, the plaintiff was thrown from the truck and injured. The court held that the plaintiff did indeed assume the risk of injury by riding in the truck. Suppose, however, that the plaintiff had been looking for lost livestock rather than hunting deer—would the result have been the same? Certainly imprudent activities should be discouraged, but that is precisely what contributory negligence is all about. A person is contributorily negligent if he fails to care for his person—under the circumstances. Thus the "circumstances" in cases such as *Herod* would be automatically considered.

2. Allows a Defense in Those Areas Where Contributory Negligence Is No Defense At All

Another area in which the proper labeling of the plaintiff's conduct becomes significant is one in which contributory negligence is no defense at all. For example, assumption of risk bars recovery in actions founded on strict liability, while the plaintiff's contributory negligence may not.[139] The plaintiff may assume the risk when the defendant is guilty of wilful and wanton negligence, but his contributory negligence would not have been a defense.[140] Furthermore, assumption of risk may also

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[135] *See, e.g.*, Herod v. Grant, 262 So. 2d 781 (Miss. 1972) (deer hunting at night); Griffin v. Holliday, 233 So. 2d 820 (Miss. 1970) (intoxicated driver).

[136] *See* note 78 *supra*.

[137] Pedrick, *supra* note 77, at 99. "In short, on moralistic grounds they bar the plaintiff on the basis of his participation or involvement in the defendant's tortious conduct."

[138] 262 So. 2d 781 (Miss. 1972).

[139] PROSSER § 68, at 456. *See* Maraist & Barksdale, *supra* note 100, at 191.

[140] PROSSER § 68, at 456. *See* Anderson v. Eagle Motor Lines, Inc., 423 F.2d 81 (5th Cir. 1970).

serve as a defense when the defendant had the last clear chance.[141] When considered in light of Mississippi's comparative negligence statute, the inequity of these results is manifest. For example, in a products liability suit the failure of an injured party to discover and avoid injury from a patently injury-producing defect should not be an absolute bar to recovery.[142] In Mississippi, however, the injured consumer may be denied relief for injuries caused by an open or obvious defect.[143] This appears to violate the legislative policy of "comparing" negligence. A similar analogy would likely apply to cases involving wilful and wanton negligence of the defendant. Assuming the defendant was guilty of gross negligence, while the plaintiff was guilty of only ordinary negligence, the plaintiff would presumably be entitled to some damages simply because of this lesser degree of negligence. If he assumed the risk, however, he would be totally barred from recovery. Again, the legislative intent is capable of being thwarted.

3. Allows The Court to Take the Case from the Jury

In some instances the court may hold, as a matter of law, that the plaintiff assumed the risk and thus direct a verdict for the defendant. Assumption of risk, however, only duplicates other concepts of law which permit the court to take the case from the jury, or, in Mississippi, permit the jury to take the case out of the comparative negligence rule. The concepts of "duty" or "proximate cause" would suffice as substitutes. For example, if the court determined that the defendant owed no duty to the plaintiff, the plaintiff would be barred from recovery as a matter of law. Similarly, if the plaintiff's conduct amounted to the sole proximate cause of his injury, the court could prevent his case from reaching the jury.[144]

The basics of tort law require that for a plaintiff to recover, he must prove the defendant has breached a duty. Thus it is incumbent for the plaintiff to prove the existence of a duty. If no duty exists, there can be no breach, and the plaintiff will suffer a directed verdict. When a defendant pleads assumption of risk, he is logically arguing that because of the plaintiff's conduct, he should have no cause of action against the defendant. When so considered, assumption of risk does nothing more than deny the defendant's duty of care. Hence the same result may be

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[141]PROSSER § 68, at 456.

[142]Maraist & Barksdale, *supra* note 100, at 191.

[143]Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558, 561-62 (1962); Maraist & Barksdale, *supra* note 100, at 191.

[144]*See* Jones v. Greer Rice Dryer & Shop, Inc., 262 So. 2d 419 (Miss. 1972); Jackson Ready-Mix Concrete v. Sexton, 235 So. 2d 267 (Miss. 1970).

reached under the concepts of "assumption of risk" and "lack of duty." For this reason, the term "assumption of risk" contributes needless duplication and confusion.

The leading opponent of the abolition movement was the late Dean Prosser. Prosser opposed the abolition of the doctrine in favor of duty primarily because of procedural difficulties.[145] In a normal lawsuit, the burden of proof of the duty and its breach is upon the plaintiff. Likewise the burden of proof of an affirmative defense (such as assumption of risk) falls on the defendant. Prosser suggested that a shift of ground to duty would correspondingly shift the burden of proof to the plaintiff, thus imposing a procedural disadvantage upon him.[146] One commentator reasons that there has been no real shift in burden, since the plaintiff simply retains a burden already his.[147] This tends to oversimplify the true problem, however, since the plaintiff is ordinarily required to make only a prima facie showing that a duty exists. Thus, it appears that the defendant must then come forward with positive proof of no duty. Consider, for example, the situation where a spectator in the bleachers of a baseball park is hit and injured by a foul ball. The injured spectator may establish a prima facie case simply by proving the existence of a duty upon the owner of the baseball park to provide screened seats for the patrons. It is possible for the defendant, however, to deny the existence of a duty by proving that screened seats were available for those who desired to use them. Prosser contended, therefore, that if the defendant must prove no duty, the result is nothing more than a change in terminology. If this is true, Prosser questioned, why not continue to call it assumption of risk as the courts always have?[148]

Prosser's argument is certainly valid—why indeed abolish the doctrine if the results under another label will be identical? To repeat, duplication of concepts is unnecessary. Duplication tends to cloud the issues, confuse the jury, and provide insubstantial foundations of law. For example, in the recent products liability case of *Ward v. Hobart Manufacturing Co.*,[149] the Mississippi district court relied in part on the assumption of risk doctrine to explain its decision. On appeal, however, the Fifth Circuit Court of Appeals completely ignored assumption of risk, preferring instead to couch its decision in terms of "lack of duty." It seems logical that a better structure of law could be established by the use of a consistent term.

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145 *See* PROSSER § 68, at 454-55.

146 *Id.* at 455.

147 Note, *Assumption of Risk Bites the Dust in Idaho - Almost,* 6 IDAHO L. REV. 119, 123 (1969).

148 PROSSER § 68, at 456.

149 317 F. Supp. 841, 852-53 (S.D. Miss. 1970), *rev'd,* 450 F.2d 1176 (5th Cir. 1971).

Another area in which the concepts are often applied interchangeably is that which involves owners and occupiers of land. While one Mississippi case holds that a licensee who has actual knowledge of a danger assumes the risk of that danger, and "cannot maintain an action for an injury resulting from such a danger,"[150] another Mississippi case grounds its decision by declaring that "an owner of land owes no duty to trespassers or licensees except to refrain from wilful or wanton injury."[151] It appears that this type of case could be more effectively rationalized under the single "duty" concept.

In further reply to Prosser's question of why the phrase, assumption of risk, should be abolished if the results would be identical under another concept, duty, it is submitted that the results would not *always* be identical. Only in the clearest of cases in which the court could rule as a matter of law that the defendant had no duty would the results be the same as if assumption of risk were applied. In other close cases the change in results would be significant. For example, in the preceding section several cases involving "secondary" or "implied" assumption of risk were examined. In none of these cases was the defendant's duty, or lack of it, so clear-cut as to require a directed verdict. Hence if assumption of risk were abolished, recovery in all probability would have been contingent solely upon contributory negligence. This, of course, is in accord with the intent of Mississippi's comparative negligence statute.

4. Completely Bars Recovery in Comparative Negligence Jurisdictions

It is evident that most of the grounds for criticizing the real uses of the doctrine stem from its application in a comparative negligence jurisdiction. The tenuous distinctions between assumption of risk and contributory negligence have been examined. Unfortunately, such distinctions tend to produce completely diverse results. It does not seem equitable to allow partial relief to a person "who has been so negligent as not to discover his peril at all," yet absolutely bar recovery to one "who has at least exercised proper care in that respect, but has made a mistake in judgment in proceeding to encounter the danger after it is known."[152] It is possible to reroute the operation of the doctrine, at least in its secondary sense, around a theory of reasonableness. For example,

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[150]McDonald v. Wilmut Gas & Oil Co., 180 Miss. 350, 360, 176 So. 395, 396-97 (1937).

[151]West v. Williams, 245 So. 2d 591, 592 (Miss. 1971), *citing* Roberts v. Mississippi Power & Light Co., 193 Miss. 627, 638, 10 So. 2d 542, 544 (1942).

[152]PROSSER § 68, at 457.

if a party voluntarily encounters a known risk, yet has a reasonable alternative, he has acted unreasonably and is thus contributorily negligent. On the other hand, if he has no reasonable alternative, he has assumed no risk.[153] Hence implied assumption of risk situations could be reclassified under contributory negligence.

B. Alternatives

In the primary sense, assumption of risk is contractual. The parties can *expressly* agree, in advance, that the plaintiff will assume a particular risk. In the secondary sense, assumption of risk is *implied.* In this event, the plaintiff, by words or conduct, implies that he will assume the risk. If, therefore, assumption of risk were to be abolished, should it be completely abolished, or should express assumption of risk be retained?

It is not difficult to understand why assumption of risk in the secondary sense would be the first to go. This, of course, is the area in which the doctrines of assumption of risk and contributory negligence are often confused. By abolishing assumption of risk in the secondary sense, the courts would in effect be recognizing that if a plaintiff unreasonably places himself in a dangerous position, he is contributorily negligent, but if he acts reasonably, he has not assumed a risk. Abolishing this type of assumption of risk would appear to satisfy the intent of the comparative negligence statute.

Assuming that implied assumption of risk were abolished, should express assumption of risk also be abolished? Ordinarily express assumption of risk is established by contract. The agreement usually provides that the defendant will not be liable for injuries to the plaintiff in certain circumstances.[154] Generally speaking, such contracts are valid unless the agreement violates public policy.[155] For example, the courts have invali-

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[153]Comment, *Distinctions Between Assumption of Risk and Contributory Negligence,* 23 WASH. & LEE L. REV. 91, 100 (1966), which states that "it is never reasonable knowingly to encounter a danger when there is a reasonable alternative; and when there is no reasonable alternative, there cannot be any voluntary choice, a fortiori, no assumption of risk." *Accord,* Note, *Assumption of Risk Bites the Dust in Idaho - Almost,* 6 IDAHO L. REV. 119, 124-25 (1969), which states that "when the plaintiff puts himself in a position unreasonably, he is contributorily negligent, but ... if he has acted reasonably, he assumed no risk." *See* Rice, *supra* note 77, at 341, where it is stated that "venturesomeness is clearly classifiable as contributory negligence when the risk taken would not have been encountered by a reasonably prudent man."

[154]RESTATEMENT (SECOND) OF TORTS § 496 B, comment *a* at 565 (1965).

[155]*Id.* § 496 B, comment *e* at 567; James, *Assumption of Risk,* 61 YALE L.J. 141, 163 (1952).

dated agreements between employer and employee,[156] agreements in which there has been a disparity of bargaining power between the parties,[157] and agreements in which the gravity of risk was significantly disproportionate to the benefits from creating it.[158] As a practical matter, if a plaintiff expressly assumes a risk, he has done nothing more than relieve the defendant from a duty. Hence, if express assumption of risk is abolished, it would be replaced by the "duty" concept. The consequences of such a change have been discussed. It is interesting to note the views of the New Jersey Supreme Court when faced with the decision of whether to retain express assumption of risk. The court had preserved express assumption of risk in 1959,[159] but when confronted with the issue again in 1963, declared:

> In Meistrich we said the terminology of assumption of the risk should not be used when it is projected in its secondary sense, i.e., that of contributory negligence . . . . We thought, however, that "[p]erhaps a well-guarded charge of assumption of risk in its primary sense will aid comprehension." . . . Experience, however, indicates the term "assumption of risk" is so apt to create mist that it is better banished from the scene. We hope we have heard the last of it. Henceforth let us stay with "negligence" and "contributory negligence."[160]

The court thus disposed of both express and implied assumption of risk.

In summary, assumption of risk appears to be an "inaptly transplanted defense"—particularly in comparative negligence jurisdictions such as Mississippi. Application of the doctrine is neither consistent nor predictable, and often results in regrettable decisions. As a result, the doctrine adds little more than confusion to contemporary law. The Mississippi Supreme Court has manifested a reluctance to apply the doctrine.[161] In order to eliminate the confusion and delicate distinctions

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[156]RESTATEMENT (SECOND) OF TORTS, § 496 B, comment *f* at 567.

[157]*Id.* § 496 B, comment *j* at 569.

[158]James, *supra* note 155, at 163.

[159]Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959).

[160]McGrath v. American Cyanamid Co., 41 N.J. 272, 196 A.2d 238, 240-41 (1963).

[161]*See* Shurley v. Hoskins, 271 So. 2d 439 (Miss. 1973); Canton Broiler Farms, Inc. v. Warren, 214 So. 2d 671 (Miss. 1968); White v. Mississippi Power & Light Co., 196 So. 2d 343 (Miss. 1967); Dendy v. City of Pascagoula, 193 So. 2d 559 (Miss. 1967); Wallace v. J. C. Penney Co., 236 Miss. 367, 109 So. 2d 876 (1959).

The court has recently declared:

> To apply the assumption of risk doctrine because of the negligence of the plaintiff without regard to the degree of care exercised by the defendant would, in many instances, be equivalent to barring the plaintiff's recovery in cases where the defendant was negligent or exercised a degree of care inferior to that required by law.

between assumption of risk and contributory negligence, the assumed risk doctrine should be completely abolished. Future problems should be discussed with reference to the concepts of contributory negligence and duty. Only then will Mississippi jurisprudence exhibit the true intent of its damage-apportionment statute.

David E. Wilder

Shurley v. Hoskins, *supra* at 443-44. This statement by the court is extremely interesting, for does not assumption of risk *always* bar the plaintiff's recovery in cases where the defendant was negligent or exercised a degree of care inferior to that required by law? Has the court not held before that assumption of risk is a bar to recovery even if the defendant were guilty of gross negligence? It is submitted that were the court to follow the instant reasoning in all assumption of risk cases, the doctrine would have no future in Mississippi.

THE MISSISSIPPI IMPLIED CONSENT ACT: ADMINISTRATIVE AND CRIMNAL PROCEDURES

I. Introduction

Following the lead of 48 other states,[1] Mississippi enacted an Implied Consent Statute[2] effective April 1, 1972, which implies the consent of motorists to chemical testing of the motorist's blood for alcoholic content. If the motorist refuses, his license will be suspended. By "implying" the consent of motorists to chemical testing, the legislature is attempting to increase the convictions for drunken driving by the use of accurate, reliable scientific evidence. If the test is refused, the administrative penalty of license suspension will at least remove the dangerous driver from the road. Federal legislation establishing the power to reduce highway funds to the states unless certain federal safety requirements were met was also instrumental in the passage of the Mississippi Act.[3] The aim of these sanctions is to deter drunken driving

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[1]Ala. Code tit. 36, § 154 (Supp. 1971); Alaska Stat. § 28.35.031 (1970); Ariz. Rev. Stat. Ann. § 28-691 (Supp. 1969-70); Ark. Stat. Ann. § 75-1045 (Supp. 1969); Cal. Vehicle Code § 13353 (1971); Colo. Rev. Stat. Ann. § 13-5-30 (Supp. 1971); Conn. Gen. Stat. Ann. § 14-337-6 (1970); Fla. Stat. Ann. § 322.261 (1968); Ga. Code Ann. § 68-1625.1 (Supp. 1972); Hawaii Rev. Stat. § 286-151 (1968); Idaho Code § 49-352 (1967); Ind. Ann. Stat. § 47-2003c (Supp. 1972); Iowa Code Ann. § 32113.3 (Supp. 1972); Kan. Stat. Ann. § 8-1001 (1964); Ky. Rev. Stat. Ann. § 186.565 (1969); La. Rev. Stat. § 32.661 (Supp. 1973); Me. Rev. Stat. Ann. tit. 29, § 1312 (Supp. 1972): Md. Ann. Code art. 66½ § 6-205.1 (Cum. Supp. 1972); Mass. Gen. Laws Ann. ch. 90, § 24 (Supp. 1972); Mich. Comp. Laws Ann. § 257.625a (Supp. 1972); Minn. Stat. Ann. § 169.123 (Supp. 1973); Mo. Ann. Stat. § 564.441 (Supp. 1972); Mont. Rev. Codes Ann. § 32-2142.1 (Supp. 1971); Neb. Rev. Stat. § 39-727.03 (1960); Nev. Rev. Stat. § 484.385 (1971); N.H. Rev. Stat. Ann. § 262-A: 69-a (Supp. 1972); N.J. Stat. Ann. § 39:4-50.2 (Supp. 1972); N.M. Stat. Ann. § 64-22-2.6 (1972); N.Y. Veh. & Traf. Law § 1194 (Supp. 1972); N.C. Gen. Stat. § 20-16.2 (Supp. 1972); N.D. Cent. Code § 39-20-01 (1972); Ohio Rev. Code Ann. 45 11.19.1 (Supp. 1972); Okla. Stat. Ann. tit. 47, § 751 (Supp. 1972); Ore. Rev. Stat. § 483-634 (1971); Pa. Stat. Ann. 75.624.1 (1971); R.I. Gen. Laws Ann. § 31-27-2.1 (1969); S.C. Code Ann. § 46-344 (Supp. 1972); S.D. Com. Laws Ann. § 32-23-10 (Supp. 1972); Tenn. Code Ann. § 59-1045 (Supp. 1972); Tex. Penal Code art. 802f (Supp. 1972); Utah Code Ann. § 41-6-44.10 (1970); Vt. Stat. Ann. tit. 23, § 1188 (1967); Va. Code Ann. § 18.1-55.1 (Supp. 1972); Wash. Rev. Code Ann. § 46.20.308 (1970); W. Va. Code Ann. § 17C-5A-1 (Supp. 1972); Wis. Stat. Ann. § 343.305 (Supp. 1973); Wyo. Stat. Ann. § 31-247.2 (Supp. 1971).

[2]Miss. Code Ann. § 8175-01 to -26 (Supp. 1972). This section will appear in the new Code of 1972 as Miss. Code Ann. § 63-11-1 to -47 (1972).

[3]The most probable motivation for the enactment of the Mississippi Implied Consent Act is federal legislation entitled Highway Safety Act of 1966, Pub. L. No. 89-

and decrease its destruction of people and property.[4] This comment will focus on the effect of the Mississippi Act in deterring drunken driving. Certain Mississippi procedures will be examined in light of constitutional requirements, but a general discussion of the constitutionality of implied consent to chemical testing will not be undertaken,[5] since no such statute

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564, Title I, § 101, 80 Stat. 731. This act authorizes the Secretary of Transportation to require the states to comply with certain mandates. The Highway Safety Act of 1966 further authorizes the Secretary of Transportation to withhold up to 10 percent of a state's federal highway funds if the state does not comply with the federal safety standards promulgated pursuant to the act. The act also requires the governor of each state to establish an agency with the organization and power to carry out the safety programs initiated. This agency in Mississippi is entitled the Governor's Highway Safety Commission.

On June 27, 1967, the Secretary of Transportation, pursuant to the power granted him by the Highway Safety Act of 1966, issued *Highway Safety Program Standard No.* 8. It required the states to enact legislation establishing implied consent of motorists to chemical testing for intoxication.

On July 18, 1972, the Secretary of Transportation issued revised standards. 23 C.F.R. § 242.6. (1972). This revised standard contains four requirements which the Mississippi Act does *not* meet. They are:

(1) It shall be unlawful to drive while .10 percent of the blood content is alcohol. The Mississippi Act simply establishes a *presumption* of intoxication by the alcoholic content of the blood. *See infra* pp. 502-03.

(2) Law enforcement officials shall be empowered to make lawful misdemeanor arrests without a warrant for traffic violations not committed in the officer's presence. In Mississippi, misdemeanor arrests for violations not committed in the arresting officer's presence can be made only with a warrant. *See infra* pp. 485-86, 499.

(3) The administrative penalty for refusing to submit to the chemical test shall be *revocation* of the driver's license for a minimum of 6 months. The Mississippi Act, however, only *suspends* the driver's license for 3 months. *See infra* p. 492.

(4) The states shall establish a preliminary test which may be given before the motorist is under arrest. The Mississippi act does provide for a preliminary, unofficial test, but it may not be given until the driver is placed under arrest. *See infra* pp. 505-06.

[4]For example, the annual death rate on the highways in recent years has been between 50 and 60 thousand. Alcohol has been involved in approximately one-half of these fatalities. U.S. DEP'T OF TRANSP., HIGHWAY AND TRAFFIC SAFETY 1970 at 13 (1971).

[5]The two major cases in this area are Schmerber v. California, 384 U.S. 757 (1966) and Breithaupt v. Abrams, 352 U.S. 432 (1957).

In *Breithaupt*, the Court held that the taking of blood from an unconscious driver was not violative of due process standards. While not considering the Kansas implied consent statute, the Court seemed to recognize its validity. 352 U.S. at 435 n.2 (1957).

In *Schmerber*, the Court went a step further than *Breithaupt* by holding that the taking of a driver's blood by force over his objection was a search under the fourth amendment but was reasonable since probable cause for arrest existed and the warrantless search was incident to lawful arrest. More important was the Court's

has been adjudged unconstitutional.[6]

For the purposes of this comment the Act will be analyzed through five sections:

(1) When the Act can be invoked;
(2) How the Act is to be invoked;
(3) Refusal to take the test;
(4) The test itself; and
(5) Consent to the test.

I. When The Act Can Be Invoked

Section 8175-04 implies the consent of "any person who operates a motor vehicle upon the public highways, public roads and streets" to a chemical test for alcohol intoxication. The use of the word "operate" appears to allow a broader use of the Act than some states which require

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holding that the driver's fifth and sixth amendment rights were not violated. Relying on the "testimonial" characterization of the scope of the fifth amendment, the Court held that the taking of blood did not violate the driver's privilege against self-incrimination. Since the driver did not have the right to refuse the blood test, there was no right to counsel under the sixth amendment.

It seems clear that other methods of testing for alcohol such as breath, saliva, and urine are less invading than the extraction of blood and, therefore, will be treated the same.

The police power of the state to imply consent of motorist to certain lawful action was settled in Hess v. Pawloski, 274 U.S. 352 (1927). The case upheld a state statute providing that nonresident motorists had impliedly consented to the appointment of the state registrar for service of process by their acceptance of the privilege of driving on the state highways.

For in-depth analysis of the constitutionality of the implied consent theory of chemical testing, *see generally* Reeder, *Interpretation of Implied Consent Laws by the Courts,* 19 Traffic Dig. & Rev. 17 (*Aug.* 1971); Comment, *Admissibility and Constitutionality of Chemical Intoxication Tests,* 35 Texas L. Rev. 813 (1957); Comment, *"Implied Consent" of Intoxicated Drivers to Submit to Chemical Test in Tennessee,* 38 Tenn. L. Rev. 585, 586-88 (1971); Comment, *Driving While Intoxicated—Implied Consent Statute in Ohio,* 20 W. Res. L. Rev. 277, 282-91.

[6]The first implied consent statute was enacted in New York. It was held unconstitutional in Schutt v. Macduff, 205 Misc. 2d 43, 127 N.Y.S. 2d 116 (Sup. Ct. 1954). The statute was immediately amended to require arrest before testing and further added procedural requirements for an administrative hearing. The statute was then upheld in Anderson v. Macduff, 208 Misc. 2d 271, 143 N.Y.S. 2d 257 (Sup. Ct. 1955). No other state implied consent statute has been held unconstitutional. *See, e.g.,* Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971); State v. Berg, 76 Ariz. 96, 259 P.2d 261 (1953); People v. Brown, 485 P.2d 500 (Colo. 1971), *cert. denied,* 404 U.S. 1007 (1972); Lee v. State, 187 Kan. 566, 358 P.2d 765 (1961); Blydenburg v. Davis, 413 S.W.2d 284 (Mo. 1967); State v. Kroening, 274 Wis. 266, 79 N.W.2d 810 (1956).

that the motorist actually be "driving"[7] before his consent to a test is implied. The word "drive" connotes the control of a vehicle in motion, while a vehicle could be "operated" without actually moving;[8] however, section 8175-09 further provides that a law officer is required to inform the motorist of the consequences of refusing the test when "the arresting officer has reasonable grounds and probable cause to believe such person to have been *driving* a motor vehicle. . . ." This possible ambiguity in section 8175-09 is regretable. If the license suspension penalty is available only for motorists who were "driving," the fact that the Act implies the consent of those who also "operate" a vehicle is a mandate without a penalty. In *Farley v. State*,[9] the Mississippi Supreme Court allowed an indictment to proceed on the allegation that the defendant "operated" a vehicle even though the statute in question referred only to "driving" a vehicle.[10] It is not clear whether the court was incorporating the more inclusive meaning of "operate" or merely holding that the word was synonymous with the word "driving," which connotes movement of the car. While the defendant in *Farley* was never seen moving the vehicle, the court apparently assumed that it had been moved, relying on the fact that the vehicle was easily cranked the morning following the arrest. However, since the validity of a misdemeanor arrest is founded upon commission in the officer's presence,[11] the motion of the vehicle must not have been a requirement for the offense of "driving" while intoxicated.

The uncertain meaning of the words "driving" and "operating" produces another ambiguity in the Act. Even if section 8175-09 is interpreted to mean "operation" of a vehicle, the more restrictive word "drive" is again encountered in section 8175-04. This section of the Act makes it unlawful to "drive" a vehicle while intoxicated and makes no mention of "operation" of a vehicle. If the word "drive" is given a more restrictive meaning than the implied consent section 8175-09, the result would be to require the test in some circumstances for which section 8175-04 provides no criminal penalty. The state legislature should clarify these ambiguities by adding the words "or operate" wherever the word "drive" is used.

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[7]*E.g.*, CAL. VEHICLE CODE § 13353 (1971); COLO. REV. STAT. ANN. § 13-5-30 (Supp. 1971).

[8]In Ferguson v. State, 198 Miss. 825, 828, 23 So. 2d 687, 688 (1945), the Mississippi Supreme Court said, "One who drives a motor vehicle is, of course, operating it, though he may operate a motor vehicle without driving it." *See also*, State v. Joswick, 233 A.2d 154 (Del. 1967); McDuell v. State, 231 A.2d 265, 267 (Del. 1967).

[9]251 Miss. 497, 170 So. 2d 625 (1965).

[10]Act of Apr. 6, 1938, ch. 200, [1938] GEN. LAWS MISS. 444 (repealed 1972); Act of Apr. 9, 1952, ch. 262, [1952] GEN. LAWS MISS. 293 (repealed 1972).

[11]*See* note 31 *infra*.

Even if the Act can be construed to include the "operation" of a vehicle, such interpretation is not the full extension of implied consent. Some states have extended the applicability of implied consent to include an "attempt to operate."[12] This wording would extend the Act's coverage to unconscious inebriates found in automobiles. It is doubtful if the Act's present coverage could be extended to cover such unconscious motorists.

Although some states extend the coverage of their respective implied consent acts to any location in the state,[13] most states limit its applicability to public roads.[14] Mississippi has limited its Act to public roads and highways,[15] while making it a crime to drive while intoxicated anywhere in the state.[16] In *Farley v. State*,[17] the Mississippi Supreme Court held that driving a vehicle while intoxicated was a crime whether on public or private roads. *Farley* was decided under section 8174 of the Mississippi Code which provides in part: "It is unlawful. . . for any person. . .who is under the influence of. . .intoxicating liquor. . .to drive any vehicle *within this state.*"[18] This statute was repealed[19] and replaced in part by section 8175-04.[20] The pertinent language in section 8175-04 remained essentially unchanged; therefore, the interpretation in *Farley* that "within this state" includes both public roads and private roads is still appropriate. Although it is unlawful to drive while intoxicated on either public or private roads, section 8175-09 implies the motorist's consent only for "any offense. . .while the person was driving. . .on the *public* highways, *public* roads and streets of this state. . . ."

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[12]*See, e.g.*, ME. REV. STAT. ANN. tit. 29, § 1312 (Supp. 1972); VT. STAT. ANN. tit. 23, § 1188 (1967). The reasonable interpretation of the Mississippi Act would not allow officers to invoke the Act if, for example, they were called to a tavern or bar to restrain an inebriate from driving. He would have to at least manipulate some of the controls of a vehicle before he could be deemed "operating" a motor vehicle. But in State v. Pritchett, 173 A.2d 886 (Del. 1961), the Delaware court held that the defendant was guilty of "operating" a vehicle while intoxicated because the vehicle was running, the lights were on, and the defendant was asleep in the driver's seat.

[13]*E.g.*, FLA. STAT. ANN. § 322.261 (1968); KY. REV. STAT. ANN. § 186.565 (1968).

[14]*E.g.*, ARK. STAT. ANN. § 75-1045 (Supp. 1969); TEX. PENAL CODE art. 802f (Supp. 1972).

[15]MISS. CODE ANN. § 8175-09 (Supp. 1972).

[16]*Id.* § 8175-04.

[17]251 Miss. 497, 170 So. 2d. 625 (1965).

[18]Act of Apr. 6, 1938, ch. 20, [1938] GEN. LAWS MISS. 444 (repealed 1972; Act of Apr. 9, 1952, ch. 262, [1952] GEN. LAWS MISS. 293 (repealed 1972) (emphasis added).

[19][1971] GEN. LAWS MISS., ch. 515, § 28 (effective April 1, 1972).

[20]MISS. CODE ANN. § 8175-04 (Supp. 1972).

II. How the Act is Invoked

For the Act to be invoked, the arresting officer must satisfy two requirements.[21] First, he must lawfully arrest the driver. Second, the arrest must be for an offense arising from acts committed while driving a motor vehicle under the influence of intoxicating liquor. The specific use of "intoxicating liquor" suggests that consent to a chemical test is not implied under the Act for one who is incapacitated due to drugs other than liquor. The Act further requires that only the arresting officer can meet these requirements.[22]

While some states require that the arrest be for the offense of drunk driving,[23] most states only require that there be a lawful arrest for any offense committed while driving under the influence of alcohol.[24] By using the language "any offense" in its statute, Mississippi appears to follow the majority on this point. Since most arrests of drunken drivers are initially for reckless driving, the majority view is the better view, as it allows the officer to observe the driver's conduct, speech, and smell of his breath, and thereby establish reasonable grounds to believe the driver is intoxicated.[25]

A few states have removed the arrest requirement from their implied consent act.[26] Although this increased intrusion of privacy might be questionable, they do require that probable cause for arrest exist before the test can be offered. This does not appear to expand the scope of the implied consent to any situations which the Mississippi Act does not cover, since an arrest would be proper if probable cause existed.

Since the Mississippi implied consent statute is not invoked until there is a "lawful arrest,"[27] a problem could arise when an officer reaches the scene of an accident and suspects that a driver is intoxicated. Since drunken driving is a misdemeanor in Mississippi, a lawful arrest without a warrant can not be made unless a crime takes place in the officer's presence.[28] Some states meet this problem by allowing officers to arrest if they have reasonable grounds to believe the motorist was operating

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[21] *Id.* § 8175-09.

[22] *Id.*

[23] *E.g.*, Me. Rev. Stat. Ann. tit. 29, § 1312 (Supp. 1972).

[24] *E.g.*, Ala. Code tit, 36, § 154 (Supp. 1971); Ark. Stat. Ann. § 75-1045 (Supp. 1969).

[25] *See, e.g.*, Clancy v. Kelly, 7 App. Div. 2d 820, 180 N.Y.S.2d 923, 924 (1958).

[26] *E.g.*, Ind. Code Ann. § 47-2003c (Burns Supp. 1970); Minn. Stat. Ann. § 169.123 (Supp. 1973). *See also*, U.S. Dep't of Transp. standards, *supra* note 4.

[27] *See* Okla. Stat. Ann. tit. 47, § 751 (Supp. 1972).

[28] *E.g.*, Butler v. State, 135 Miss. 885, 101 So. 193 (1924); Letow v. United States Fidelity Co., 120 Miss. 763, 83 So. 81 (1919).

a vehicle while intoxicated.[29] While some courts have liberally construed the scope of lawful misdemeanor arrests for drunken driving,[30] this should be specifically allowed by the statute.[31] Since the Mississippi statute is based only on the alcohol content at the time of testing,[32] the time it takes an officer to reach the scene plus the time it takes him to acquire an arrest warrant will allow the dissipation of much of the alcohol in the driver's body.[33] Furthermore, the state faces the loss of part of its federal highway funds if it does not provide for warrantless misdemeanor arrests for traffic violations not committed in the arresting officer's presence.[34]

Once the driver is under lawful arrest and the officer has reasonable grounds to believe that the suspect was driving while intoxicated, the officer may request the driver to submit to a chemical test to determine the alcoholic content of the driver's blood.[35] The Mississippi statute provides for chemical tests of blood, breath, or urine,[36] but the statute does not clearly indicate whether the arresting officer or the driver determines which of the tests is to be applied.[37] Although most states

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[29]*See* VA. CODE ANN. § 19.1-100 (1950).

[30]*E.g.*, State v. Williams, 98 Ohio App. 513, 130 N.E.2d 395 (1954). *See also* Comment, *Driving While Intoxicated—Implied Consent in Ohio, supra* note 5, at 293.

[31]The Mississippi Supreme Court has consistently required strict adherence to the rule that misdemeanor arrest by officials be only for crimes committed in the officer's presence or by warrant. *E.g.*, Butler v. State, 212 So. 2d 573 (Miss. 1968); Smith v. State, 208 So. 2d 746 (Miss. 1968). *See also* MISS. CODE ANN. § 2470 (Supp. 1972).

[32]MISS. CODE ANN. § 8175-15 (Supp. 1972).

[33]By specifying the use of the alcohol content of the blood at the time of testing, the Mississippi Act cannot be interpreted to allow extrapolation. Since the offense is for driving while intoxicated, some states use the estimated alcoholic content at the time of arrest and not the actual content upon testing. The estimated alcohol content is computed by the use of standard dissipation. It has been determined that alcohol in the blood dissipates at the rate of .015 percent per hour. By increasing the percentage found in the body at the time of testing by the estimated amount of dissipation, the alcohol percentage at the time of arrest may be calculated. The formula is (percentage of sample) + (.015 x the number of hours). R. ERWIN, DEFENSE OF DRUNK DRIVING CASES ch. 15 § 15.01, pt. 6, at 8 (3d ed. 1972) [hereinafter cited as ERWIN, DRUNK DRIVING CASES].

[34]*See* note 3 *supra*.

[35]MISS. CODE ANN. § 8175-09 (Supp. 1972).

[36]*Id.* § 8175-16.

[37]*Id.* § 8175-09, provides, in part, that "the test shall be administered at the direction of . . . the arresting officer." This does not specifically grant the officer the right to choose which test shall be given. It should be noted that section 8175-09, in providing for an unofficial preliminary test, refers to the "official chemical analysis test of his breath." But in section 8175-11, the Act provides for the penalty of refusing "to submit to a chemical test designated

have interpreted language similar to that in the Mississippi Act to give the choice of tests to the law enforcement official,[38] at least one state has overturned convictions because the defendant was not given his choice of tests.[39] If the defendant is allowed to choose which test he will be given, he may be able to frustrate the statute by requesting a test which is unavailable. It would be wasteful and economically unfeasible to require each law enforcement agency to be prepared to administer every type of test.

While the theory of implied consent is to enable law enforcement agencies to acquire convincing scientific evidence of intoxication, the Mississippi Act requires neither that the test be given nor grants the defendant the right to one.[40] A Mississippi case decided prior to the Implied Consent Act delineated the circumstances which would entitle a defendant to a chemical test. In *Scarborough v. State*[41] the defendant was arrested for driving while intoxicated and his request for a blood test was refused. He was not allowed to make a telephone call for two hours. The Mississippi Supreme Court said:

> We announce as a constitutional rule that holding a prisoner incommunicado and unreasonably denying or ignoring his request for assistance to have tests made amounts to a denial of due process of law by thus suppressing possible evidence favorable to the defendant, provided the defendant can show:
>
> 1. Request to have a test made at his own expense.
> 2. Cooperation with officers so that no reasonable apprehension of difficulty in handling the prisoner exists so the test can be made consistent with safe custody.

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by the law enforcement agency. . . ." This seems to indicate that the officer designates which test the motorist must take and the motorist may not evade the administrative penalty by offering to take a type of test other than that designated by the arresting officer. However, a statutory reference service catergorizes Mississippi as a state where only a breath test may be offered if the motorist refuses all types of tests and requests the breath test. INTERNATIONAL ASS'N OF CHIEFS OF POLICE, LEGISLATIVE RESEARCH DIGEST Comp. 6, at 17 (1972).

[38]*E.g.*, Lee v. State, 187 Kan. 566, 358 P.2d 765, 769 (1961); Timm v. State, 110 N.W.2d 359, 362-63 (N.D. 1961). The Uniform Vehicle Code § 6-205.1 recommends that: "The law enforcement official shall designate which of the tests shall be administered. However, the motorist will have the option to demand that only a breath test be administered."

[39]Bean v. State, 12 Utah 2d 76, 362 P.2d 750 (1961); Ringwood v. State, 8 Utah 2d 287, 333 P.2d 943 (1959).

[40]This is evident not because the Act does not grant the motorist a right to take a test, but also because the Act provides a penalty for conviction when no test was given. MISS. CODE ANN. § 8175-07 (Supp. 1972).

[41]261 So. 2d 475 (Miss. 1972), *appeal dismissed*, 41 U.S.L.W. 3442 (U.S. Feb. 20, 1973).

> 3. Availability of facilities and personnel to make test at time and place requested which is reasonably accessible to the place of incarceration.
> 4. Refusal by officers to permit prisoner to communicate with an attorney or other person of his choice in an effort to have a requested test made.[42]

While this case was decided before the Mississippi Act went into effect, the court recognized its coming. Since the Act does not require that a test be given, *Scarborough* presents the Mississippi position when no test is given by the law enforcement agency and the defendant requests one.

The Act does grant the defendant who actually takes a police administered test the right to an independent test by a person of his own choosing, but the failure or inability to secure this independent test does not preclude the use of the test given by the law enforcement agency.[43] The Act does not require law enforcement officers to inform the defendant of his right to an independent test,[44] but it does provide that "anyone arrested under the provisions of this act shall be informed immediately after being booked that he has the right to telephone for the purposes of requesting legal or medical assistance."[45] This should serve to allow the uninformed defendant to discover his right to an independent test. Discovery at the time of booking, however, will probably be of little consequence. The inequities of such late notification were pointed out in the following language from *Scarborough:*

> It is a matter of common knowledge that time sobers a drunk up since the level of alcohol in the blood decreases with each passing hour. The critical stage in proceedings against anyone charged with intoxication, is immediately after the arrest. To limit such person's access to an attorney or friends until after a certain number of hours have passed is in effect denying him effective means to prepare a defense.[46]

This rationale would certainly apply if policemen delayed booking a defendant in order to render his right to legal or medical assistance ineffective.

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[42]*Id.* at 479.

[43]MISS. CODE ANN. § 8175-18 (Supp. 1972).

[44]In Lacy v. Orr, 276 Cal. App. 694, 81 Cal. Rptr. 276 (1969), a California court held that even though the statute gave the defendant the right to an independent test, there was no burden on law enforcement officials to inform the defendant of this right. *See* People v. Kovacik, 205 Misc. 275, 128 N.Y.S.2d 492, 508-09 (Ct. of Spec. Sess. 1954).

[45]MISS. CODE ANN. § 8175-09 (Supp. 1972).

[46]261 So. 2d at 477.

The final consideration on the invocation of the Act is the defendant's right to counsel before submitting to or refusing the test. There are two constitutional issues involved. First, is there a right to counsel under the sixth amendment? Second, if there is a right to counsel, is the warning requirement of *Miranda v. Arizona*[47] applicable? There is a split of authority on the defendant's sixth amendment right to counsel. It is clear that if the defendant has no choice about taking the test, he has no rights with which legal counsel could assist him.[48] A problem has arisen, however, when the statute grants the defendant the right to refuse the test. The issue is further complicated by the distinction drawn by some courts between statutes granting a right of refusal and statutes merely stipulating that no test will be given if the defendant refuses to submit.[49] Right to counsel is applicable when there is a critical stage in the prosecution and legal assistance is necessary to protect the rights of the accused.[50] If the defendant's refusal results in the forfeiture of his driver's license, it could be argued that this is a critical stage at which legal advice could assist the defendant in his choice of alternatives. A minority of courts have found the right to counsel to be present before the defendant decides whether to submit to chemical testing.[51] The more logical result has been reached by other courts which have held that the defendant has the right to confer with counsel as long as it does not endanger the giving of the test.[52] Time is of essence since the alcohol dissipates in the body with the passage of time, and the statutory purpose of gathering chemical evidence would be frustrated if the defendant were

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[47]He must be warned prior to any questions that he has the right to remain silent, that anything he says can be used against him in a court of law, *that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him* prior to any questioning if he so desires.

384 U.S. 436, 479 (1966) (emphasis added).

[48]Schmerber v. California, 384 U.S. 757, 765-66 (1966); *accord* People v. Craft, 28 N.Y.2d 274, 270 N.E.2d 297 (1971).

[49]In Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971), the court was reviewing a statute which, like section 8175-11 of the Mississippi Act, simply states that no test shall be given if the defendant refuses. The court said:

> This language does not give a person a "right" to refuse to submit to the test, only the physical power. . . . [T]he "obvious reason for acquiescence in the refusal of such a test by a person who as a matter of law is 'deemed to have given his consent' is to avoid the violence which would often attend forcible test upon recalicitrant inebriates."

Id., 479 P.2d at 692, *citing* Bush v. Bright, 264 Cal. App. 2d 788, 71 Cal. Rptr. 123, 124 (1968).

[50]Powell v. Alabama, 278 U.S. 45 (1932).

[51]*E.g.*, City of Tacoma v. Heater, 67 Wash. 2d 733, 409 P.2d 867 (1966).

[52]People v. Gursey, 22 N.Y.2d 224, 239 N.E.2d. 351, 292 N.Y.S.2d 416 (1968).

allowed to delay the test.[53] A majority of courts have found that prior to the determination of whether to submit to a chemical test, no right to counsel exists,[54] thereby assuring that the test will be given at a time when the result will be most indicative of the alcoholic content of the defendant's body.[55]

If there is no right to counsel before the test when the defendant requests one, it surely follows that law enforcement officers are not required to inform the defendant of a non-existent right to counsel. If however, the defendant does have a right to counsel, the question arises as to whether he must be informed of this right. While an overwhelming majority of courts have held that *Miranda* warnings are not applicable,[56] at least one court has required them.[57] The cases have consistently found *Miranda* inapplicable for various reasons. One approach is that since the defendant does not have the right to refuse the test, there is no need for the assistance of legal counsel.[58] This rationale, based on *Schmerber v. California*,[59] can present a problem if the state statute in question grants the defendant the right to refuse the test.[60] Some courts have

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[53]The rationale of the Mississippi Supreme Court in deciding that if a test requested by the defendant is going to have any meaning it must be available without delay is also applicable to the statutory test. Scarborough v. State, 261 So. 2d 475 (Miss. 1972).

This is especially true when the alcohol reading to be used is from the time of testing and not an extrapolation of the alcohol reading at the time of apprehension. MISS. CODE ANN. § 8175-15 (Supp. 1972). *See also* note 33 *supra*.

[54]*E.g.*, Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971); State v. Stevens, 252 A.2d 58 (Me. 1969).

[55]The Mississippi case of Scarborough v. State, 261 So. 2d 475 (Miss. 1972) *appeal dismissed*, 41 U.S.L.W. 3442 (U.S. Feb. 20, 1973), was decided before the Mississippi statute was effective and concerned a due process question of the defendant's right to call a doctor to give him a blood test for alcohol content, but it would seem to indicate that the Mississippi Supreme Court will follow the majoriy in finding no right to counsel before choosing to submit to or refuse a chemical test.

[56]*E.g.*, Campbell v. Superior Court, 106 Ariz. 542, 479 P. 2d 685 (1971); State v. Kenderski, 99 N.J. Super. 224, 239 A.2d 249 (App. Div. 1968).

[57]In the case of Government of Virgin Islands v. Quinones, 301 F. Supp. 246 (D. V.I. 1969), a federal district court held that *Schmerber* did not apply to a state statute which granted the right to refuse the test and therefore the *Miranda* warnings must be given. The court did not consider the question of appointed counsel for indigents, but seemed to imply that all sixth amendment rights applied.

[58]*See also* State v. Randolph, 273 N.C. 120, 159 S.E.2d 324 (1968).

[59]384 U.S. 757 (1966).

[60]This would require the unnecessary and questionable distinction the Arizona court made between the statutory right to refuse and the authority to see that no test is given without his actual consent. Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971). *See* note 49 *supra*.

found that *Miranda* warnings are not required in misdemeanor cases.[61] This reasoning is questionable in light of the recent Supreme Court case of *Argersinger v. Hamlin*,[62] which required that indigents have the benefit of appointed counsel at any trial which might result in incarceration. The Court was not willing to accept the state's determination to dispense with the defendant's right to counsel where the punishment was minimal. While *Argersinger* was concerned with only the trial stage, it does cast doubt on the misdemeanor-felony dichotomy as a basis for deciding when a right to counsel exists. The most logical basis for finding *Miranda* inapplicable is that *Miranda* is based on the fifth amendment right against self-incrimination and not a sixth amendment right to counsel.[63] This would enable those states which do find a right to counsel under their statute not to require that *Miranda* warnings be given before a defendant may be required to submit to the chemical test. It is clear that if the full *Miranda* warnings are required, including appointed counsel for indigents, the resulting delay would severely restrict the effect of the statute.[64] Under *Schmerber* there is no doubt that a chemical test for intoxication is not "testimonial" and therefore not protected by the fifth amendment. As one state court[65] recently said:

> *Miranda* is bottomed on the privilege against self-incrimination and bars the use of communications by or testimonial utterances

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[61] *E.g.*, State v. Pyle, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969).

[62] 407 U.S. 25 (1972).

[63] *E.g.*, A New York district court in People v. Gielarowski, 58 Misc. 2d 832, 296 N.Y.S.2d 878 (Sup. Ct. 1968), said that *Miranda* did not apply to the sobriety test since *Miranda* was based on the fifth amendment privilege against self-incrimination and not the sixth amendment. It should be noted, however, that the New York implied consent statute does not specifically grant the defendant the right to refuse the test, but does provide him with the authority to see that no test is given without his actual consent.

[64] *See generally*, 7 WAKE FOREST L. REV. 313 (1971). The author concludes his discussion of whether *Miranda* warnings should apply to sobriety test with:

> Requiring the full *Miranda* warnings . . . will introduce other problems of even greater magnitude such as the expense to the state in providing lawyers for drivers who claim they cannot afford counsel and the possible interference that could occur with the giving of the test while waiting for a lawyer to be located. To add these problems to an already difficult job of enforcing highway safety seems unreasonable when the basic reason for the *Miranda* warnings is to insure that the accused is treated fairly and that his conconstitutional rights are protected. These requirements can be met by informing the accused of his various options under the statute and, if he desires the aid of counsel in assisting him to make his decisions, by allowing him reasonable opportunity to obtain this advice. If the accused is fully advised of the rights given to him by the statute, the courts would be reasonable in holding that the *Miranda* warnings do not have to be given to the accused before he takes the breathalyzer or blood test.

Id. at 324-25. *See also* Comment, *The Pennsylvania Implied Consent Law: Problems Arising in a Criminal Proceeding*, 74 DICK. L. REV. 219, 237-39 (1970).

[65] State v. Kenderski, 99 N.J. Super. 224, 239 A.2d 249 (App. Div. 1968).

of a person unless the four-fold warning has been given and applied. A breathalyzer test is unrelated to a communication by the subject. Rather, it is a search of the person and therefore subject only to a question of reasonableness.[66]

III. Refusal to Take the Test

If a driver refuses to submit to a breath test, the Act provides that none shall be given.[67] The refusal to submit invokes the administrative penalty of suspension of the driving privilege. This has no relation to the criminal sanctions that still may be imposed under section 8175-07 which provides for prosecution when no chemical test is given.[68]

Section 8175-11 provides that the arresting officer may demand the license of the person refusing to submit to testing. The officer is then required to give the driver a receipt for his license and forward the license to the Commissioner of Public Safety along with a sworn report that the officer had reasonable grounds to believe that the motorist had been driving while intoxicated and refused the officer's request to submit to a breath test. The license is suspended for 90 days from the time of arrest. This penalty for refusing to submit to the test is not as severe as in most states. The Uniform Vehicle Code suggests that the license be revoked rather than suspended, which means that the license is not automatically reinstated.[69] More than half of the states provide for a suspension or revocation for at least 6 months. Nebraska imposes a criminal sanction as well as an administrative penalty for refusing to submit to a chemical test.[70] The present federal standard requires that the driver's license be *revoked* for a minimum of 6 months. Even though Mississippi faces a possible loss of up to 10 percent of its federal highway funds, Mississippi Senate bill 1508, which would have amended section 8175-11 from 90 days to 180 days, failed to gain passage in the 1973 legislative session.[71]

Section 8175-12 establishes the hearing procedure for a person who has refused to submit to a test and has forfeited his license to the requesting officer. The burden of initiating the hearing is upon the individual. Upon request, the Commissioner of Public Safety will provide the individual a hearing on whether the license suspension was in accordance with the Act. The hearing request will be granted in accordance with the

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[66] *Id.* at 251.

[67] Miss. Code Ann. § 8175-11 (Supp. 1972).

[68] *E.g.*, Anderson v. Macduff, 208 Misc. 271, 143 N.Y.S.2d 257 (Sup. Ct. 1954).

[69] Uniform Vehicle Code § 6-205.1 (1968).

[70] Neb. Rev. Stat. § 39-727.03 (1960).

[71] *See* note 3 *supra.*

license suspension procedure used prior to the Act. The Act provides that the only issues which the individual may raise at the hearing are whether:

(1) the officer had probable cause to believe the motorist had been driving while intoxicated upon public roads;

(2) the motorist was placed under arrest;

(3) the motorist in fact refused to submit to the officer's request to submit to a test; or

(4) the officer informed the motorist of the consequences of refusing to take the test.[72]

The constitutionality of this procedure is questionable in light of recent United States Supreme Court decisions. While courts in the past have denied the application of the due process clause of the 14th amendment on the theory that driving is a privilege and not a right,[73] the Supreme Court in *Bell v. Burson*[74] recently said:

> Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. (citations omitted) This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege."[75]

It is clear that license suspension by the state must meet the requirements of due process of law as guaranteed by the United States Constitution.[76] The Mississippi Act contains two procedures which might not meet due process standards.

First, the Mississippi Act provides for suspension of the license before a hearing is held. The Supreme Court in *Bell* said:

> [I]t is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to ter-

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[72]Miss. Code Ann. § 8175-12 (Supp. 1972).

[73]Thornhill v. Kirkman, 62 So. 2d 740 (Fla. 1953); *cf.* Pollion v. Lewis, 320 F. Supp. 1343 (N.D. Ill. 1970).

[74]402 U.S. 535 (1971); *see* 56 Minn. L. Rev. 264 (1971).

[75]402 U.S. at 539.

[76]*E.g.*, Reese v. Kassab, 334 F. Supp. 744 (W.D. Pa. 1971) (suspension of license under a point system based on penalties from traffic violation held to be proper only after notice and opportunity to be heard were afforded the motorist). *See generally* K. Davis, Administrative Law Text § 7.13 (1959).

> minate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective.[77]

In *Bell*, an uninsured motorist's license was suspended because he failed to meet financial responsibility laws following an accident. This pre-hearing suspension was held unconstitutional, as have been other state actions adjudicating important personal interests prior to a hearing.[78] Nevertheless, the Court in *Bell* implied that emergency situations might arise which would allow a pre-hearing suspension. In *Goldberg v. Kelly*,[79] the Court said:

> [I]n a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing.[80]

It could be argued that suspension of driver's license for those intoxicated would be an emergency situation where the "public interest is threatened." This, however, would entail the drawing of a negative inference – that the motorist would not refuse unless he was intoxicated. In *Campbell v. Superior Court*,[81] the Arizona Supreme Court upheld pre-hearing suspension as an emergency situation envisioned in *Goldberg* and drew a negative inference from the motorist's refusal, saying:

> [T]here is a high degree of probability that a motorist who refuses to submit to a reasonably reliable chemical test for determining intoxication is a dangerous driver; therefore, it is the opinion of this court that there exists a compelling public in-

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[77]402 U.S. at 542.

[78]The Court in *Bell* relied on the cases of Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (establishing the right to a hearing prior to the garnishment of wages), and Goldberg v. Kelly, 397 U.S. 254 (1970) (establishing the right to a hearing prior to discontinuance of welfare payments).

[79]397 U.S. 254 (1970).

[80]*Id.* at 263 n.10.

[81]106 Ariz. 542, 479 P.2d 685 (1971). The same result was reached by the Kentucky Court of Appeals in Craig v. Commonwealth, 471 S.W.2d 11 (Ky. Ct. App. 1971). This case was decided after the *Bell* case which required a hearing prior to the suspension of license under financial responsibility laws. Both *Goldberg* and *Bell* allow for emergency situations and the Kentucky court cited the Arizona court's negative inference of intoxication. While the Kentucky court did not discuss the effect of the *Bell* decision on pre-hearing suspension under implied consent, it seems they assumed it to be an exception as an emergency situation due to the motorist being deemed dangerous to the public by this negative inference of intoxication drawn from his refusal to submit to an alcohol test. *See also* City of Westerville v. Cunningham, 15 Ohio St. 2d 121, 239 N.E.2d 40 (1968).

terest in the immediate removal of such persons from the highways of this state pending a hearing on the matter.[82]

Although the Supreme Court has given no guidelines as to what is an emergency situation,[83] there appears to be a valid argument that an intoxicated driver would present an emergency, and immediate suspension of his license would be necessary for the protection of the public. However, the 14th amendment requirements of notice and opportunity to be heard are still applicable. The question then arises as to what procedure must be afforded the motorist following his license suspension. The traditional requirements of notice and opportunity have been developed for the situation where the state has not yet acted, but plans to adjudicate a vital interest of the individual. If pre-hearing suspension under implied consent statutes is allowed as an emergency exception to the 14th amendment, the state action affecting the individual has already taken place. It would seem that the protection of the individual's rights demanded a notification of his right to a hearing.[84] The Mississippi Act does not require such notice. It only provides the right to hearing and judicial review if the individual requests them.[85] The Supreme Court has said "that due process does not demand 'inflexible procedures universally applicable to every imaginable situation,' but must be resolved after a balancing of the governmental function involved against the substance of the private interest affected."[86] If the state is allowed to suspend a person's license without a hearing, the "substance of the private interest affected" seems to be compelling enough to require that the state carry the burden of assuring the right to a hearing rather than the individual having to initiate the proceeding without notice of this right. In *Goldberg*, the Court held that pre-hearing suspension should not be allowed but further implied that a pre-hearing suspension "pending a later hearing" might be permissible. It would seem that a state should at least provide notice to the individual of his right to a hearing on the restriction placed upon him. While it could be argued that the state must hold

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[82]106 Ariz. 542, 479 P.2d 685, 694 (1971).

[83]In *Bell* the Court cited some emergency cases involving the taking of property, but these cases turned on the theory that there was a distinction between property rights and personal rights. 402 U.S. at 542 n.5. *See* North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

[84]In Grannis v. Ordean, 234 U.S. 385, 394 (1914), the Supreme Court said that the opportunity to be heard is a fundamental requisite of due process. Since the opportunity to be heard will be a reality only if the motorist requests a hearing it would seem that due process would require that he must be told by the state of his right to be heard upon request.

[85]Miss. Code Ann. § 8175-12 (Supp. 1972).

[86]Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

a hearing on the action already taken, it would be better to require only notice to the individual of the right to a hearing. This would assure that the individual was accorded his 14th amendment right to due process while not triggering the state administrative procedure unless the individual planned to avail himself of it.[87]

Authority can be found for requiring the state to bear the burden of protecting the individual's rights in those cases where emergency situations have ceased to exist.[88] Once the emergency has ceased to exist, so has the power to act in a manner prohibited by the Constitution. Therefore, when the intoxicated motorist (assuming that his intoxication can be inferred from his refusal to take the test) has sobered, the emergency of the danger to the public no longer exists. It would seem that the state would then be responsible for holding a hearing in order for the suspension to continue, or at least notify the defendant that a hearing is available.[89]

If review of the suspension is held, it is limited to the four issues stated above. The first two have been discussed in section I. The third issue that may be raised at the hearing is whether the arresting officer informed the defendant of the consequences of a refusal to submit to the test. The Act specifically directs the arresting officer to inform the motorist,[90] and a failure to do so will result in the reinstatement of the driver's license.[91]

The final basis for reinstatement of the license at the hearing is whether the motorist in fact refused to submit to a test.[92] A qualified assent has been held to be a refusal where a motorist agreed to the test

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[87]However, Illinois, the last state to enact implied consent legislation, not only provides for notice of the hearing but also does not suspend the license for 28 days. If by that time the motorist has not requested a hearing, this license is then suspended. ILL. ANN. STAT. ch. 95½, § 11-501.1 (1971).

[88]*See, e.g.*, Jefferson Standard Life Ins. Co. v. Noble, 185 Miss. 360, 188 So. 289 (1939).

[89]*See* Holland v. Parker, 469 F.2d 1013 (8th Cir., 1972). *Contra,* Funke v. Department of Motor Vehicles, 1 Cal. App. 3d 449, 81 Cal. Rptr. 662 (1969); August v. Department of Motor Vehicles, 264 Cal. App. 2d 52, 70 Cal. Rptr. 172 (1968).

[90]MISS. CODE ANN. § 8175-09 (Supp. 1972).

[91]*See* Harrington v. Tofany, 59 Misc. 2d. 197, 298 N.Y.S.2d 283 (Sup. Ct. 1969). In State v. Batterman, 79 S.D. 191, 110 N.W.2d 139 (1961), the court held that a failure of the officer to inform the defendant of the consequences of a refusal was grounds for reinstatement of the license but did not affect the admissibility of the test results in the criminal proceeding. However, the Uniform Vehicle Code specifically provides that failure to warn of the consequences shall not be an issue at the hearing.

[92]It seems that a clear, unequivocal request is necessary. *See, e.g.,* Commonwealth v. Powers, 453 S.W.2d 260 (Ky. Ct. App. 1970).

only if his own physician was present,[93] where a motorist delayed submission,[94] or where a motorist requested an unavailable test.[95] If a right to counsel exists, the delay resulting from a request to consult with an attorney should not constitute a refusal. If, however, no right to counsel exists before deciding, a delay in submitting for this reason will constitute a refusal.[96]

While the Act designates only four issues that may be raised in the hearing, it is possible that in Mississippi the non-intoxication of the motorist might be an issue due to a flaw in the Act. Section 8175-11 provides that any person acquitted in the criminal proceeding shall have his license automatically reinstated. The underlying theory of implied consent is that the license suspension is a penalty for refusing the test and not a penalty for driving while intoxicated.[97] The Mississippi Act eliminates much of the incentive for a motorist to take the test. If a motorist refuses the test, the police are denied the convincing chemical proof of intoxication which increases criminal convictions. The motorist is rewarded for making the conviction harder to obtain by having his license returned if the state fails to convict him. Perhaps the drafters of the Act felt that since the suspension period was only 90 days, a motorist would not be able to obtain an acquittal prior to the return of his license. In addition to this glaring weakness of automatic reinstatement upon acquittal of the criminal charge, it is possible that innocence might be a proper issue at the administrative hearing. A counterveiling incentive for taking the test is the fact that when no test is given, the most severe penalty must be imposed upon a convicted driver. Under section 8175-15 there are two degrees of intoxication based upon the alcoholic content of the blood. If no test is given, it is assumed that the defendant was driving while intoxicated rather than the less severe offense of driving under the influence. Section 8175-12 states four issues wihch are to be included at the hearing but does not specifically restrict the hearing to only those issues. Innocence or guilt is not an issue in the majority of state administrative hearings, but this is because the license revocation is treated as the penalty for refusing the test and the results

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[93]Cushman v. Tofany, 36 App. Div. 2d 1000, 321 N.Y.S.2d 831 (Sup. Ct. 1971).

[94]Law v. City of Danville, 212 Va. 702, 187 S.E.2d 197 (1972).

[95]*See* State v. Lauseng, 289 Minn. 344, 183 N.W.2d 926 (1971).

[96]State v. Pandoli, 109 N.J. Super. 1, 262 A.2d 41 (App. Div. 1970). *But see* Rust v. Department of Motor Vehicles, 267 Cal. App. 2d 545, 73 Cal. Rptr. 366 (1968), where the court held that if *Miranda* warnings were given, even though not required before the test, the defendant's misunderstanding that he did have a right to counsel was not a refusal to take the test.

[97]Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971); Smestad v. Ellingson, 191 N.W.2d 799 (N.D. 1971).

of any criminal proceeding have no bearing.[98] If guilt or innocence is a proper issue at the administrative hearing, it will complicate what should be a simple procedure and thereby circumvent the effect of the statute. The penalty for refusing a test should be solely an administrative determination. If it develops that people are refusing the test and escaping license suspension, there will be no incentive to take the test.

Section 8175-22 provides that a refusal to submit to the test is admissible in a criminal action under the Act. In the states where there is no statutory provision on the admissibility of a refusal, it has been held that since the test itself is nontestimonial and no right to refuse exists, then the refusal also is nontestimonial and its admittance does not violate the defendant's fifth amendment privilege against self-incrimination.[99] However, states which do grant the defendant the right to refuse the test have also allowed evidence of a refusal to take the test to be introduced in a criminal action.[100] As previously discussed[101] it is unclear whether the Mississippi statute grants the defendant the right to refuse or only the power to stop the test.[102] Since the Mississippi statute explicitly provides for the admissibility of the refusal in criminal actions, it seems clear that no right to refuse was granted. Since a statutory right may be qualified by the state, it seems that the right to refuse the test is limited by the provision allowing introduction of evidence regarding the refusal.

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[98]*E.g.*, Campbell v. Superior Court, 107 Ariz. 330, 487 P.2d 397 (1971); Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971). In Ziemba v. Johns, 183 Neb. 644, 163 N.W.2d 780 (1968), the defendant argued that he refused to take the test because he planned to plead guilty to the drunken driving charge, which he subequently did. He argued that since the whole purpose of the implied consent statute was to obtain criminal convictions, the statutory revocation for refusal should not apply to him. The court rejected this argument on the grounds that the administrative revocation and criminal proceeding were entirely separate and independent of each other. *But see* State v. Schlief, 289 Minn. 461, 185 N.W.2d 274 (1971). *See* Note, 2 ST. MARY'S L.J. 134 (1970), for a discussion of the Texas statute which also requires automatic reinstatement of the license if acquitted of the criminal charge.

[99]*E.g.*, Campbell v. Superior Court, 107 Ariz. 330, 487 P.2d 397 (1971). *Contra*, Gay v. City of Orlando, 202 So. 2d 896 (Fla. App. 1967).

[100]*E.g.*, Stuart v. District of Columbia, 157 A.2d 294 (D.C. 1960); Cupp v. State, 373 P.2d 260 (Okla. Crim. App. 1962). *Contra*, State v. Bock, 80 Idaho 296, 328 P.2d 1065 (1958). *See also* Annot., 87 A.L.R.2d 370 (1963).

[101]The Arizona court's distinction between the motorist's right to refuse the test and the authority to not permit the test to be given could become important if Mississippi feels compelled to follow the majority holding that a refusal is inadmissible in the criminal action if the right to refuse is granted by the statute. *See* note 49 *supra*.

[102]MISS. CODE ANN. § 8175-09 (Supp. 1972).

Section 8175-23 provides that neither a refusal to submit to testing nor the test results may be introduced in evidence in a civil case. Section 8175-24 provides that neither the refusal nor the test results shall affect any insurance policy. This would presumably apply also to evidence of a suspension of the license resulting from the refusal, otherwise, the section would be almost meaningless since nearly all refusals will result in a 90-day license suspension.

Section 8175-10, which applies only to those who were driving, provides for the taking of blood samples from dead or unconscious accident victims. This section allows a test to be given even though there is no actual consent. The section further provides that these test results may not be used in any criminal or administrative hearing unless the person tested consents. Nevertheless, if the defendant refuses criminal action, he may be subject to the administrative suspension procedure just as if he had refused the test initially. Some states have tried, with conflicting results, to use blood samples from accident victims incapable of consent which were taken before the defendant was arrested.[103] The Mississippi statute seems to indicate that the incapable accident victim is first to be placed under arrest, as indicated by the use of the words "arresting officer has reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways. . . ." If an arrest is a prerequisite for the section, it will be hindered by the fact that Mississippi has no statute allowing DWI arrests following accidents unless the officer can meet the common law requirements of either a warrant or observing the commission of the misdemeanor.[104] This is another major flaw in the Mississippi Act. The placement of common law misdemeanor arrest requirements upon the statute minimizes its effect in both ordinary accidents and those situations involving persons found intoxicated but not operating a vehicle in the officer's presence.[105] It is submitted that the Mississippi Legislature should authorize warrantless arrests based upon probable cause that the defendant was driving while intoxicated.[106]

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[103]State v. Mitchell, 245 So. 2d 618 (Fla. 1971) (held admissible). In State v. Deshner, 489 P.2d 1290 (Mont. 1971), the Montana court allowed the introduction of a blood test taken while the defendant was unconscious and before he was arrested. But in People v. Superior Court, 6 Cal. 3d 757, 493 P.2d 1145, 100 Cal. Rptr. 281 (1972), the California Supreme Court en banc held that the blood test was a search and seizure and could be upheld only as incident to a lawful arrest.

[104]*See* notes 3 & 31 *supra.*

[105]*See* notes 3 & 12 *supra.*

[106]It should be explicitly authorized for both accidents and all DWI cases. An illustrative case of this fact is June v. Tofany, 34 App. Div. 2d 732, 311 N.Y.S.2d 782 (1970), where the New York statute allowing warrantless misdemeanor arrests for

Further incentive for this recommendation is provided by the possibility of the loss of a portion of the state's allocated federal highway funds.[107]

IV. The Test Itself

While there are many types of tests,[108] Mississippi has chosen to use the photo-electric intoximeter.[109] This machine analyzes the breath of the individual by separating the carbon dioxide in the breath from the true lung air (alveolar air). This enhances the validity of the test result because the alcohol percent in the blood is estimated by a proven ratio of the alcohol in the breath to blood alcohol. The ratio is based upon the alcohol in the alveolar air only. If the carbon dioxide was not separated from the breath, the conversion procedure would have to be complicated by an estimation of how much carbon dioxide was in the breath and how much alveolar air remained.[110]

The photo-electric intoximeter test is founded on a conversion ratio from breath to blood. The conversion ratio used is 2100:1.[111] There is a standard 10 percent margin of error in the conversion ratio while some comparison tests show as much as a 25 percent error.[112] The machine collects two samples of alveolar air, one of which gives the result measured by the machine while the other is collected in a tube which may be tested in a laboratory. Thus, the two samples can be compared and, if a discrepancy appears, another test may be taken.[113]

In addition to the built-in margin of error in estimating blood alcohol from that found in the breath, there are other factors affecting the assumption of intoxication from certain statutory percentages. It has been shown that the effect of alcohol is greater when rising than when

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violations in accidents could not be invoked upon a man found unconscious in an automobile with surrounding evidence of intoxication since the offense was not committed in the officer's presence. The statute applied only to accidents and there was no evidence that any accident had taken place.

[107]*See* note 3 *supra*.

[108]Erwin, Drunk Driving Cases ch. 17-25.

[109]Letter from Mr. Ernie Albritton, Representative, Governor's Highway Safety Program, to Samuel R. Hammond, Feb. 8, 1973.

[110]This separation of alveolar air is the principal difference between the photo-electric intoximeter and the intoximeter previously used by many states. Most states which were using the intoximeter have switched to either the photo-electric intoximeter or the breathalyzer test because of the questionable validity of the results when assuming a certain CO_2 percent of the breath. Erwin, Drunk Driving Cases ch. 19.

[111]*Id.* at § 19.01, pt.3, at 8.

[112]*Id.*

[113]*Id.* ch. 19, § 19.02, pt.5, at 43.

falling, even though the blood contains the same percentage of alcohol.[114] Also, the individual's tolerance to alcohol is a factor. Not only are different individuals affected in varying degrees by alcohol, but the same individual may also experience different effects from the same amount of alcohol on different occasions. One commentator has stated:

> Tolerance is the [ability] of the organism to withstand the effects of alcohol. It may differ from one individual to another. Thus the same level of alcohol in the blood may not have the same effect in two different people. . . . Apart from the above differences in inherent tolerance as between individuals, an appreciable tolerance occurs in the same person on exposure to alcohol, even within the short period of a single episode of intoxication. In America, with very few exceptions, this temporary tolerance is being completely ignored.[115]

If a blood sample is being taken under the provisions of the Act, section 8175-17 provides that it may be done only by a physician, mortician, registered nurse, or clinical laboratory technologist or technician. Section 8175-19 further provides that if a urine specimen is being taken, the privacy and dignity of the individual is to be respected as much as possible while still assuring the reliability of the specimen.

Section 8175-16 requires that any chemical test must be given in accordance with the methods approved by the State Board of Health and the Commissioner of Public Safety. The Board and the Commissioner must also prescribe the requirements for permits to test and issue such permits. Only state highway patrolmen, sheriffs or their deputies, and city policemen are eligible for permits to operate the intoximeter. The State Board of Health is responsible for making periodic checks of both the accuracy of the machines and the competency of the operators.[116]

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[114] *Id.* ch. 16, § 16.04, pt.2, at 19.

[115] *Id.* at 22.

[116] Letter from Ernie Albritton, Representative, Governor's Highway Safety Program, to Samuel R. Hammond, Feb. 8, 1973, which states:

> In order for an enforcement officer to become eligible for training, he must make a passing score on a mental aptitude test, administered by the State Board of Health. Upon passing, he is then enrolled in the Implied Consent Class at the Mississippi Law Enforcement Academy for a forty (40) hour course of study. This includes background study on how the machine was built, principles and scientific laws which provide accurate and precise measurements, procedures of arrest and test, record keeping and, of course, operation. After passing an examination on the studies, the men are certified by the Department of Health as operators of the intoximeter. The basic studies are important knowledge needed in court testimony.
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> Each machine is calibrated at least once a month, and each operator is retested in the field, at least once every three months.

V. Consent to the Test and the Test Results

If the motorist consents to take the chemical test, he is not subject to any administrative penalties. Section 8175-15 provides for the admissibility in criminal actions of presumptions that shall arise from certain alcohol percentages in the motorist's blood. The alcohol content used is that at the time of the test and not the projected content at the time of arrest.[117] If the alcohol in the blood is less than .10 percent by weight, the motorist is presumed not to have been under the influence of intoxicating liquor. If the alcohol weight is .10 percent or more, but less than .15 percent, the motorist is presumed to have been driving under the influence and is subject to the punishment set forth in section 8175-05.[118] If the motorist has an alcohol weight of .15 percent or more, he is presumed to have been driving while intoxicated, and upon conviction is subject to the punishment set forth in section 8175-06.[119] The new federal standards require that driving while their is .10 percent alcohol in the blood be illegal in itself. The federal requirement does not allow a differentiation between "driving while intoxicated" and "driving under the influence."[120] The federal standard seems the best policy since most authorities feel that substantial driving impairment occurs even below .10 percent alcoholic content of the blood.[121]

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[117]*See* note 33 *supra.*

[118]Section 8175-05 of the Act provides that the first offense for driving under the influence shall be punished by imprisonment of not more than 6 months or a fine of not less than 50 dollars nor more than 500 dollars. The court does not have to levy any imprisonment since there is no minimum requirement; however, a fine of 50 dollars must be assessed as a minimum. The use of the word "or" would indicate that both a fine and imprisonment cannot be given.

A second offense in a 2-year period for driving under the influence *may* be punishable by imprisonment for 10 days to 1 year *and shall* be punished by a fine of not less than 100 dollars nor more than 1,000 dollars. Here both penalties may be assessed while a minimum fine of 100 dollars must be assessed. Furthermore, the second offense in a 2-year period *shall* be punished by a 1-year revocation of the driver's license.

[119]Section 8175-06 provides the same punishment for driving while intoxicated as is provided for the second offense in a 2-year period for driving under the influence.

[120]*See* note 3 *supra.*

[121]B. Freeman, Drunk Driving Cases: Prosecution And Defense 198 (Practising Law Institute 1970), *quoting from* Comment, *The Drinking Driver: An Approach To Solving A Problem Of Underestimated Severity,* 14 Vill. L. Rev. 97, 100 (1968). which states:

> The subjects showed some impairment of performance relative to the control group at the .05 percent alcohol level. . . . Studies testing performances in "roadeo" or driving-hazard courses in Missouri and Kansas found that subjects were noticeably impaired at an alcohol level of .08 percent, and similar

The Mississippi Act limits the use of the statutory presumptions of intoxication to "the trial of any criminal action arising out of acts alleged to have been committed by any person while driving a vehicle while under the influence of intoxicating liquor. . . ."[122] This is a wider use of the presumptions than many states which allow their use only in criminal actions for driving while intoxicated.[123] Some jurisdictions, however, place no restrictions on the use of the statutory presumptions.[124]

The statutory presumption of intoxication is rebuttable, but as a practical matter will be hard to overcome.[125] Presumptions of intoxication have been held not to destroy the constitutional presumption of innocence.[126] Statutes which make it a crime to drive with a certain percent of alcohol in the blood have even been upheld.[127] Even if the statute only provides for a presumption of intoxication with the test result alone being sufficient to convict, the same result is reached.[128] It will be a rare situation, however, when the test result is the only prosecution evidence. Since there has to be probable cause to believe the suspect was driving under the influence of alcohol, there should be corroborative testimony available.[129]

The Mississippi Act provides that the results of the test may be freely obtained by the motorist or his attorney.[130] The result may not be used by any insurance company to affect coverage, but the statute does not

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tests in Ontario indicated an impairment to most subjects at the .03 percent level. An interesting British experiment found that three experienced Manchester bus drivers, after consuming two ounces of alcohol, tried to drive their buses through an opening 14 inches narrower than their buses.

[122]MISS. CODE ANN. § 8175-15 (Supp. 1972). This section restricts the use of the statutory presumptions. Section 8175-23 provides that the test result shall not be admissible in civil actions. It would seem that the test results may be admissible in any criminal action, while the statutory presumptions of intoxication based upon the test result are applicable only in criminal trials for acts committed while driving under the influence of liquor.

[123]*E.g.*, GA. CODE ANN. § 68-1625 (b) (Supp. 1972).

[124]*E.g.*, ME. REV. STAT. ANN. tit 29, § 1312 (Supp. 1972).

[125]*E.g.*, State v. Larrabee, 156 Me. 115, 161 A.2d 855 (1960); State v. Magai, 96 N.J. Super. 109, 232 A.2d 477 (1967).

[126]*E.g.*, Varner v. State, 493 P.2d 452 (Okla. Crim. App. 1972); Johnson v. State, 487 P.2d 1005 (Okla. Crim. App. 1971).

[127]In Coxe v. State, 281 A.2d 606 (Del. 1971), a statute which made the offense to drive with .10 percent alcohol content, rather than just establishing a presumption of driving while intoxicated, was upheld.

[128]*See, e.g.*, State v. Johnson, 42 N.J. 146, 199 A.2d 809 (1964).

[129]Considering the margins of error in the testing devices and the discrepancy between individuals, there is support for requiring corroborative evidence in addition to the test.

[130]MISS. CODE ANN. § 8175-20 (Supp. 1972).

specifically prohibit a change of rates as a result of a test.[131] The protection of those individuals qualified under section 8175-17 to administer the blood test is provided in section 8175-21. They are not to be held liable in any criminal or civil proceeding for a properly administered test ordered in writing by a law enforcement official.[132]

VI. Conclusion

Mississippi has joined the rest of the states in the battle against drunken driving. The major tactics at present are criminal sanctions. The Mississippi Implied Consent Act enables law enforcement agencies to gather reliable, scientific evidence with which to prosecute the drunk driver. It also penalizes those who refuse to take the test. It must be concluded, however, that the Mississippi Act appears to be a weak, and perhaps even ineffective weapon in the battle against drunken driving. The weakness of the Act could result in the loss of a portion of the state's federal highway funds. For the safety of its citizens and the continued progress of its highway system, the Mississippi Legislature should bring the Implied Consent Act into full compliance with federal standards issued by the United States Department of Transportation.[133] This would include:

(1) Providing that .10 percent alcoholic content is illegal. This should be the only level sanctioned as illegal and should embody the penalties presently employed for those found guilty of driving while intoxicated as presumed from alcoholic content of .15 percent or more.

(2) Authorizing law enforcement officials to make warrantless misdemeanor arrests for traffic violations not committed in the arresting officer's presence. This would be especially valuable in accidents and circumstances involving unconscious drivers.

(3) Increasing the penalty for refusing to take the test to a 6-month revocation, rather than suspension, of the driver's license. In this way the state would have some control over the reinstatement of the driver's license.

The invocation of the fourth requirement of the new federal standards is not as clearly desirable as the first three. Requiring a motorist to submit to an alcohol test prior to his arrest or at least prior to the

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[131] *Id.* § 8175-25.

[132] At the time of this writing Senate bill 1744 was being considered by the 1973 session of the Mississippi Legislature. This bill would extend protection from liability for blood tests administered at the direction of law enforcement officers to hospitals, hospital trustees, clinics, and funeral homes.

[133] *See* note 3 *supra.*

manifestation of probable cause for arrest is constitutionally questionable.[134] To "screen" motorists indiscriminately would be an invasion of constitutionally protected rights.[135] It seems unquestionable that any test to determine the alcoholic content of an individual's blood would be a search protected by the fourth amendment. Nevertheless, at least one state, New York, has provided for pre-arrest testing.[136] The New York test is not an indiscriminate screening of all cars, but merely a testing upon grounds somewhat less than probable cause. The argument for this procedure is analogized to the rationale of the Supreme Court in the case of *Terry v. Ohio*,[137] in which the "stop and frisk" principle was established. The justification for "stop and frisk" is protection of the policeman: the frisk is only for weapons with which the suspect may escape or harm the officer. To equate the protection of the public to the protection of an individual police officer confronting a suspicious man is at least questionable.

Regardless of the outcome of the constitutionality of pre-arrest testing, Mississippi should at least use the full extent of preliminary testing authorized by the Mississippi Act. Based upon a preceding arrest, section 81750-09 authorizes a preliminary, unofficial breath test. Preliminary testing decentralizes the testing procedure and increases the effectiveness of implied consent,[138] and law enforcement officers will be more willing to test motorists if they are able to give an "on-the-spot" test. The portable breath test, called the "balloon" test, is not accurate enough for the conclusive evidence needed for a criminal conviction, although, it can inform officers when people who are not showing out-

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[134]In Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court held that the taking of a blood sample was a search as governed by the fourth amendment of the United States Constitution. No case has held that taking a breath sample is not also a search, therefore, the search must be either based upon a warrant or incident to a lawful arrest. An argument for the validity of a pre-arrest breath test could be made by contending that it is not a search and, like a driver's license check, is not restricted by the fourth amendment. In Holland v. Parker, 469 F.2d 1013 (8th Cir. 1972), a federal district judge was reversed for failing to convene a three-judge court to hear a challenge of the South Dakota implied consent statute. The Court of Appeals stated:

> We believe it is not unreasonable for the plaintiff to argue that due process does require a lawful arrest as a precondition to application of the statute to protect the driver against arbitrary police conduct and to protect the driver's Fourth Amendment rights.

Id. at 1015. *See also* 1971 DUKE L.J. 601.

[135]*See* Katz v. United States, 389 U.S. 347 (1967).

[136]N.Y. VEH. AND TRAF. LAW § 1193-a (1970). *But see* Schutt v. Macduff, 205 Misc. 2d 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954).

[137]392 U.S. 1 (1968). *See also* Hunvald & Zimring, *What Ever Happened to Implied Consent? A Sounding*, 33 MO. L. REV. 323 (1968); 35 ALBANY L. REV. 455, 457 (1971).

ward signs of intoxication should be taken in for testing on the photoelectric intoximeter. The officer may be detained for hours when he has to take a motorist to a central testing location. The officer will be more apt to take the motorist in when he has given the motorist the preliminary test and it has registered the motorist as intoxicated. This procedure also protects the motorist. Although informally arrested, the motorist has not been booked or cited. If he registers no intoxication the officer may simply release him. According to a representative from the Governor's Highway Safety Program, Mississippi used a preliminary "balloon" test in 1972. Although this decentralization of testing should increase the effectiveness of the Implied Consent Act, for some reason the preliminary test has been discontinued in 1973, except in one district where it is being used experimentally.

In addition to the adoption of the three federal requirements and the need for a return to decentralized, preliminary testing, two additional flaws exist in the Mississippi act. First, the Mississippi administrative hearing procedure may be unconstitutional. Even if temporary prehearing license suspension is upheld on the emergency exception, it is doubtful that the suspension can be continued without a hearing after the intoxication has ceased to exist. The very minimal restriction on state action will probably be a requirement to notify the motorist of his right to a hearing. The second additional flaw in the Act is the failure to recognize that suspension of the license is a penalty for not submitting to the test and is in no way related to whether the motorist was driving while intoxicated. Automatic reinstatement of the motorist's license upon acquittal of the criminal charge will render the Act ineffective when the populace realizes they are in a better position by refusing the test. If the administrative penalty for refusing the test is changed to revocation and the time increased from 90 days to 180 days as required by the federal standards, the incentive to take the test will be increased. However, with the time increased to 6 months, the motorist will know that his criminal case will probably be heard before then. He may still prefer to refuse the test and make his criminal prosecution more difficult by denying the state the reliable evidence of a chemical test. Under the present Mississippi Act, it does not matter if the license is suspended or revoked since the license is automatically reinstated if the motorist is acquitted of the criminal charge of drunken driving.

The ultimate judgment of "implied consent" legislation's effectiveness in combating drunk driving is yet to be made. In Mississippi during 1972, 9 months of which were under the Implied Consent Act, the death rate on state highways decreased only 3 percent. This initial period of operation should not be accepted as conclusive evidence of the program's

effectiveness. According to statistics provided by the Governor's Highway Safety Program, the deaths during the first 3 months of 1971 were 204, compared to 220 for the first 3 months of 1972. After the Act went into effect on April 1, 1972, the total number of deaths in the remaining nine months was 702, compared to 747 for the last 9 months of 1971. Comparing the 9-month period of 1972 when the Act was in effect with the last 9 months of 1971 reveals a 6 percent decrease in fatalities. There were no statistics on non-fatal crashes available. Also, no statistics on drunken driving convictions were available, but one state official involved with the program said that there were not only more convictions for drunken driving per arrest, but there were also more arrests. After an exhaustive statistical study in Missouri, one commentator concluded by saying:

> So very little is known about the various countermeasures that the assumption that this (implied consent legislation) or any other strategy is effective is largely a matter of faith. There is an immediate need to find out whether such faith is justified. In sum, implied consent helps to rationalize the administration of a process whose central tenets remain unexamined and unproved. Given present information about the magnitude of the problem of drunk driving, and the present assumptions about appropriate drunk-driving policies, implied consent is a *modest improvement* and seems worth its cost.[139]

While Mississippi must surely strengthen its Implied Consent Act, it must also continue to search for other solutions to the problem of drunk driving.[140] Those individuals found driving while intoxicated must not only be penalized and removed from the road, but they must also be treated and hopefully rehabilitated.[141] To deny the use of the

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[138]Hunvold & Zimring, *supra* note 137, at 323.

[139]*Id.* at 399 (emphasis added).

[140]*See, e.g.*, F. GRADD, ALCOHOLISM AND THE LAW (1971); Borkenstein, *Alcoholism and Law Enforcement*, 9 CRIME AND DELINQUENCY 84 (1963), *reprinted in* PRACTISING LAW INSTITUTE, DRUNK DRIVING CASES 135 (B. Freeman ed. 1970); Comment, *The Drinking Driver: An Approach to Solving a Problem of Underestimated Severity*, 14 VILL. L. REV. 97 (1969).

[141] Mississippi appears to be moving in the direction of rehabilitation. The following is taken from a letter from Mr. Ernie Albritton, Representative, Governor's Highway Safety Program, to Samuel R. Hammond, Jr., Feb. 8, 1973:

> We have begun D.W.I. Education Programs in Starkville and Tupelo, with immediate plans for Gulfport, Hattiesburg and Meridian by March 1, 1973. From that point, we will proceed to other areas as soon as possible. Our target is nine schools in operation by July 1, 1973. These programs involve four agencies. They are, the Governor's Highway Safety Program, Mississippi State University Department of Sociology, Mississippi Highway Safety Patrol Driver Improvement Bureau, and the Health Department's Alcoholism and Alcohol Abuse Program.

automobile to an individual in today's highly mobile society is tantamount to rendering him totally unproductive and will only add to his problems. However, the protection of other drivers must also be considered. Furthermore, the death and destruction wrought by intoxicated drivers is by no means caused solely by the problem drinker. "Solid citizens" drive this state's highways each and every day with some physical impairment from alcohol. A thorough alcohol education program is essential. The education of dangers of alcohol and its disastrous impairment of driving ability not only must begin in the schools, but it must reach much further. The adult populace must be informed also. Less than .10 percent alcohol level is needed for an impairment of driving ability which can be fatal to both the drinker and those who travel the roads of this state with him. Each person should have the opportunity to test his tolerance to alcohol and its effect on his motor functions. The level of alcohol content for safe use of an automobile is considerably less than the sanctions of law. A startling illustration of the physical impairment at alcohol levels for below those made illegal by law is the British report of three *experienced* bus drivers who, after the equivalent of less than two one-jigger drinks of alcohol, tried to drive through an opening 14 inches narrower than the bus they were driving.[142] Mississippi must increase its effectiveness in the battle to reduce the death, destruction, and sorrow caused by combining the use of the automobile with the use of alcohol through the establishment of a strong implied consent law and a willingness to search for new programs of rehabilitation and prevention through education.

Samuel Robert Hammond, Jr.

Briefly, here is a resumé of the school. It is a ten (10) hour course, meeting one night a week for two and one half (2½) hours for four (4) consecutive weeks. The session consists of films and instructions concerning physiological and psychological effects of alcohol in traffic safety. When cited, the offender appears before the judge and is offered the opportunity to attend this school. If the offender chooses this program, he must pay a $30.00 fee, adhere to the rules of the class, and, upon completion return to the judge for final disposition of his case. Usually, the fine will be the customary fine that the judge used for this charge, but, rather than revoke his driver's license, he may reduce the charge to D.U.I. to avoid revocation. This refers to first offenders only, because on second offense the license is revoked.
If the offender chooses not to attend this school, disposition is made immediately which should result in revocation.
After completion of this course, we anticipate the follow up on the individual who decides he has an alcohol problem and needs more help, to be carried out by the Alcoholism and Alcohol Abuse Program.

[142] *See* note 121 *supra.*

THE USE OF PRIOR CONVICTIONS FOR IMPEACHMENT IN MISSISSIPPI

Introduction

At common law, conviction for treason, felony, or misdemeanor involving either improbity or obstruction of justice constituted grounds for objection to the competency of a witness to testify at all.[1] Except in cases of perjury and subornation of perjury, the Mississippi Legislature has removed this disqualification, and persons formerly convicted of crimes are now competent to testify in all proceedings.[2] For the old procedure, the legislature substituted a right to cross-examine witnesses with respect to their prior convictions for the jury's consideration on the issue of credibility.[3] The ultimate purpose of cross-examination for impeachment purposes, from the standpoint of the cross-examiner, is to persuade the jury that, because of his prior convictions, the witness is unworthy of belief.[4]

The cross-examiner's right to inquire as to the prior criminal convictions of a witness extends both to civil[5] and criminal cases.[6] In Mississippi, the fact that the witness sought to be impeached is the defendant in a criminal prosecution places no special restriction on the right to cross-examination with respect to prior convictions.[7] Consequently, motions designed to prevent such cross-examination should be denied.[8]

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[1] McCormick's Handbook of the Law of Evidence § 43, at 84-85 (2d ed. E. Cleary 1972) [hereinafter cited as McCormick]; *cf.* Wetzel v. State, 225 Miss. 450, 76 So. 2d 188 (1954) (dictum).

[2] Miss. Code Ann. § 1692 (1956); Keithler v. State, 18 Miss. (10 S.&.M.) 192 (1848).

[3] Miss. Code Ann. § 1693 (1956) provides in pertinent part:

> Any witness may be examined touching . . . his conviction of any crime, and his answers may be contradicted, and . . . his conviction of a crime established by other evidence; and a witness shall not be excused from answering any question, material and relevant; unless the answer would expose him to criminal prosecution or penalty.

[4] Benedetti v. State, 249 So. 2d 671 (Miss. 1971); Parrish v. State, 237 Miss. 37, 112 So. 2d 548 (1959); Hassell v. State, 229 Miss. 824, 92 So. 2d 194 (1957); Wetzel v. State, 225 Miss. 450, 76 So. 2d 188 (1954); Phillips v. State, 214 Miss. 287, 43 So. 2d 208 (1949); Hegwood v. State, 206 Miss. 160, 39 So. 2d 865 (1949); Randolf v. State, 152 Miss. 48, 118 So. 354 (1928); Williams v. State, 87 Miss. 373, 39 So. 1006 (1906).

[5] *E.g.*, Stratham v. Blaine, 234 Miss. 649, 107 So. 2d 93 (1958); Brister v. Dunaway, 149 Miss. 5, 115 So. 36 (1927).

[6] *E.g.*, Benedetti v. State, 249 So. 2d 671 (Miss. 1971).

[7] Williams v. State, 87 Miss. 373, 39 So. 1006 (1906).

[8] Saucier v. State, 259 So. 2d 484 (Miss. 1972).

When the accused or any witness takes the stand to testify, his credibility is thereby placed in issue and is subject to attack.[9]

The existence of the statute authorizing cross-examination on the subject of prior convictions for impeachment raises a number of questions, not all of which have been answered by the Mississippi Supreme Court. Perhaps the threshold question is simply: what is a conviction? Are arrest records or criminal charges convictions under the statute? Further, at what point in time can it be said that a witness has been convicted? Assuming a witness has been convicted, what convictions may be used for impeachment? How extensive an examination is permissible? In resolving these questions in this comment, reference will be made to Mississippi statutes and case law where a rule has already developed in this state. In those areas where the Supreme Court has not yet ruled, reference will be made to treatises and case law from other jurisdictions in order to present the alternatives available, together with arguments for and against each alternative.

I. The Requirement of Conviction

A. Criminal Charges

While the Mississippi statute makes no specific mention of the use of arrest records or criminal charges for impeachment,[10] attorneys have sought on numerous occasions to introduce such evidence under the statute authorizing impeachment as to prior conviction.[11]

This form of impeaching evidence is subject to three objections. Some authorities have pointed out the unreliability of arrest records and indictments as indications of misconduct. The basis of this objection is that the fact of arrest or indictment is not in itself inconsistent with innocence but constitutes a mere hearsay assertion as to the guilt of a witness.[12] In addition, there exists the possibility of a full-scale dispute developing over whether the witness actually misbehaved. If such a dispute were to arise, the policy considerations against the allowance of extrinsic evidence of misconduct appear applicable. These policies include confusion of the issues before the jury and undue lengthening of the trial.[13] The exception to the general rule prohibiting the use of such

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[9]Miss. Code Ann. § 1693 (1956); Ables v. State, 223 Miss. 770, 79 So. 2d 241 (1955); Mississippi Ice & Util. Co. v. Pearce, 161 Miss. 252, 134 So. 164, 167 (1931).

[10]Miss. Code Ann. § 1693 (1956).

[11]*E.g.*, Turberville v. State, 179 So. 340 (Miss. 1938).

[12]3A. J. Wigmore, Evidence § 980a, at 835 (Chadbourn rev. ed., 1970) [hereinafter cited as Wigmore].

[13]*Id.* § 979, at 826.

extrinsic evidence, which exists in the case of impeachment by prior conviction, lies in the fact that the judgment of conviction provides reliable, legally unquestionable evidence of actual misconduct.[14] These two elements of reliability and indisputability being absent, such inquiries should not be permitted under the general rule relating to extrinsic evidence of misconduct. Similar considerations have moved many courts to forbid questioning designed to demonstrate the existence of prior arrests or indictments.[15]

In Mississippi, an additional argument presents itself for barring inquiries into former arrests or indictments. The supreme court has repeatedly held that, at least in the case of defendant-witnesses, the statute authorizing cross-examination as to prior convictions must be strictly construed.[16] Since the statute does not explicitly grant the right to inquire as to such matters,[17] it may be argued that such matters fall within the general proscription against the use of extrinsic evidence on this basis.

On the basis of such considerations, the supreme court has repeatedly reaffirmed its long-standing prohibition against the use of former indictments for impeachment of credibility.[18] Applying similar reasoning to the use of censures by the grand jury, the supreme court has also forbidden their use for impeachment.[19] While there are no Mississippi cases dealing with the use of arrest records for impeachment purposes, such records seem subject to the same objections which have moved courts to ban the use of indictments for impeachment. Like indictments, arrests may be characterized as hearsay assertions of guilt which are not inconsistent with good conduct and which are therefore not sufficiently reliable as indicators of actual misconduct.[20] Further, arrests are not explicitly authorized in the statute, and the doctrine of strict construction would seem to demand that they be held inadmissible.[21] For these

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[14]*Id.* § 980.

[15]Annot., 20 A.L.R.2d 1421, 1425 (1951); *e.g.*, Parker v. State, 280 Ala. 685, 198 So. 2d 261 (1967).

[16]Murray v. State, 266 So. 2d 139 (Miss. 1972); Johns v. State, 255 So. 2d 322 (Miss. 1971); Berry v. State, 212 Miss. 164, 54 So. 2d 222 (1951).

[17]Miss. Code Ann. § 1693 (1956).

[18]Garraga v. Yellow Cab Co., 222 Miss. 739, 77 So. 2d 276 (1955) (dictum); Turberville v. State, 179 So. 340 (Miss. 1938); Mars v. Hendon, 178 Miss. 157, 171 So. 880 (1937); Saucier v. State, 102 Miss. 647, 59 So. 858 (1912); Starling v. State, 89 Miss. 328, 42 So. 798 (1907).

[19]Barlow v. State, 233 So. 2d 829, 832 (Miss. 1970).

[20]3A Wigmore § 980a.

[21]*See* Miss. Code Ann. § 1693 (1956); Murray v. State, 266 So. 2d 139 (Miss. 1972); Johns v. State, 255 So. 2d 322 (Miss. 1971); Berry v. State, 212 Miss. 164, 54 So. 2d 222 (1951).

reasons, the Mississippi Supreme Court may be expected to rule the use of arrest records to be impermissible as a mode of impeachment of credibility through prior conviction.

That arrests and indictments may not be utilized for a showing of misconduct for impeachment does not mean such evidence is inadmissible per se. In *McClelland v. State*,[22] a witness, who had been jointly indicted with the defendant in the case on trial, took the stand to testify for the defense. On cross-examination by the prosecutor, the witness was asked over objection whether he had been jointly charged with the defendant *in the case on trial*. In holding the question proper as showing interest of the witness, the Mississippi Supreme Court stressed that the witness was asked only whether he had been jointly indicted in the offense on trial.[23] The court reasoned that, even though the witness had been discharged by the committing court, he might have been motivated not to tell the truth either by a fear of further prosecution should the defendant be found guilty, or by the contrary belief that, should the trial result in a conviction, the matter would be ended from his standpoint.[24] Thus, other evidentiary foundations may be available to the cross-examiner desiring to prove the existence of prior arrests and indictments.

B. Necessity of Judgment

The foregoing authorities strongly indicate that only convictions may be utilized for impeaching the character of a witness by showing prior crimes. These cases do not, however, contain any explicit indication of the time at which a witness has been convicted. Many Mississippi cases have permitted impeachment through the use of crimes in which judgment and sentence have been rendered,[25] but there is a paucity of authority in this state for the use of offenses upon which judgment has not been rendered. The supreme court has made it clear that withdrawn guilty pleas may not be used for impeachment.[26] Some courts have faced the question of whether pleas of guilty, guilty verdicts, and pleas of nolo contendere may be shown where no judgment has been entered.

In the case of the use of pleas of guilty upon which judgment has not been rendered, some courts, adhering to a strict technical definition of "conviction," have indicated that the word implies judgment.[27] Ac-

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[22]98 Miss. 735, 54 So. 251 (1911).

[23]*Id.* at 737, 54 So. at 251.

[24]*Id.* at 737-38, 54 So. at 252.

[25]*E.g.*, Breland v. State, 221 Miss. 371, 73 So. 2d 267 (1954).

[26]White v. State, 202 Miss. 246, 30 So. 2d 894 (1947).

[27]*E.g.*, Karasek v. Bockus, 293 Mass. 371, 199 N.E. 726 (1936); Commonwealth v. Palarino, 168 Pa. Super. 152, 77 A.2d 665 (1951).

cordingly, these courts have refused to sanction the use of guilty pleas for impeachment in the absence of a judgment.[28] In view of the requirement that Mississippi courts accord the technical meaning to technical words in statutes,[29] there is some support for this approach on the basis of terminology alone. Other courts have applied a less stringent definition to the word "conviction" by endorsing the practice of impeachment by showing a prior plea of guilty.[30] These courts have reasoned that the plea should be admitted because a conviction is equivalent to a plea of guilty.[31]

Mere terminology should not be the only consideration in statutory construction. Attention should also be given to the purpose which the legislature sought to accomplish through the enactment of the statute.[32] In the case of statutes relating to impeachment by showing prior conviction, the legislature sought to obviate the traditional objections to the use of extrinsic evidence of misconduct by providing legally unassailable evidence of actual misconduct.[33] This purpose is achieved through the familiar rules relating to conclusiveness of judgments which prevent the validity of the conviction from being questioned in collateral proceedings.[34] A plea of guilty without judgment thereon, however, constitutes an admission of past misconduct.[35] Evidence that such misconduct did not actually take place would be admissible to controvert the plea.[36] The process of introduction of the plea and counter-introduction of evidence that such misconduct did not take place raises the spectre of issue confusion and undue lengthening of the trial which the entire mechanism of impeachment by prior conviction is designed to prevent.[37] Therefore, a judgment should be the only proper means of evincing prior misconduct under the statute. The reasoning in *White v. State*[38] suggests that finality of the proceeding is necessary in order to impeach a witness under the Mississippi statute.

With regard to whether a plea of nolo contendere upon which judgment is not rendered may be used, a similar lack of mandatory authority

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[28] *E.g.*, Karasek v. Bockus, 293 Mass. 371, 199 N.E. 726 (1936); Commonwealth v. Palarino, 168 Pa. Super. 152, 77 A.2d 665 (1951).

[29] Miss. Code Ann. § 702 (1956).

[30] *E.g.*, State v. Tate, 2 Wash. App. 241, 469 P.2d 999 (1970).

[31] *E.g.*, *id.*

[32] *See* Bubar v. Dizdar, 240 Minn. 26, 60 N.W.2d 77 (1953).

[33] *See* 3A Wigmore § 980.

[34] *Id.*

[35] 4 *Id.* § 1066(4).

[36] *Id.*

[37] *See* 3A *id.* § 980.

[38] 202 Miss. 246, 30 So. 2d 894 (1947).

exists. In this state, pleas of nolo contendere are permissible under certain conditions, but only in misdemeanor cases.[39] Most courts have, for impeachment purposes, held that convictions based upon nolo contendere pleas are admissible in the same manner as convictions based on guilty pleas.[40] These courts have reasoned that such pleas are substantially equivalent to guilt pleas and constitute an implied admission of guilt.[41] A few courts, concerned that the plea is an admission of guilt only for the purposes of the proceeding in which entered, have barred the use of convictions based on the plea for impeachment.[42] Like the plea of guilty upon which no judgment has been rendered, pleas of nolo contendere upon which there is no judgment are regarded as inadmissible for impeachment by prior conviction.[43]

In a few cases, impeachment of witnesses has been attempted through the use of guilty verdicts on which no judgment has been entered.[44] Some courts have regarded such efforts proper, reasoning that a guilty verdict is equivalent to a conviction and that such verdicts are correct until set aside.[45] Other courts, for various reasons, have refused to sanction the use of guilty verdicts for impeachment by prior conviction except where judgment has been rendered.[46] While the use of a guilty verdict without judgment has been rejected on the basis of the evidentiary rule that a verdict may be shown only by the record of judgment,[47] the most cogent reasoning for allowing impeachment only through judgments may be found in *People v. Marendi*.[48] In the *Marendi* case, the New York court reasoned that verdicts should not be admitted for impeachment by prior conviction because they may be set aside, never resulting in judgment.[49] In other words, until a judgment has been rendered, the process of adjudication in the trial court has not been completed. The process of adjudication is completed only when, after careful consideration of defense motions, the trial judge finds the conduct of the trial proper and enters judgment. The admission of bare

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[39]*See generally* MISS. CODE ANN. § 2564 (1956); Bruno v. Cook, 224 So. 2d 567 (Miss. 1969).

[40]*E.g.*, Lacey v. People, 442 P.2d 402, 405-06 (Colo. 1968); Annot., 146 A.L.R. 867 (1943).

[41]Annot., 146 A.L.R. at 867-69.

[42]*Id.* at 869-70; *e.g.*, Wright v. State, 38 Ala. App. 64, 79 So. 2d 66 (1954).

[43]Remington v. Judd, 186 Wis. 338, 202 N.W. 679 (1925).

[44]*See* Annot., 14 A.L.R.3d 1272 (1967).

[45]*E.g.*, State v. Reyes, 99 Ariz. 257, 408 P.2d 400 (1965).

[46]Annot., 14 A.L.R.3d at 1274-76.

[47]Fairman v. State, 429 P.2d 63 (Nev. 1967).

[48]213 N.Y. 600, 107 N.E. 1058 (1915).

[49]*Id.*, 107 N.E. at 1963.

jury verdicts would compromise one of the great safeguards of justice — the trial judge's power to reject improper verdicts. Therefore, only judgments, and not mere verdicts, should be admitted for impeachment by prior conviction.

II. Convictions Subject to Inquiry

Section 1693 provides that "any crime" may be used as a basis for cross-examination and contradiction to impeach credibility.[50] Crime in this context has been judicially defined as "any violation of law liable to punishment by criminal prosecution."[51] Under this definition, cross-examination and contradiction is proper as to any felony[52] or misdemeanor[53] of which the witness has previously been convicted. Such convictions may arise in the mayor's courts, justice of the peace courts, county courts, or circuit courts.[54] Since judgments of conviction from other state courts and federal courts equally evince guilt and thus bad character, convictions in these courts should likewise be admissible for impeachment of credibility.[55]

The all-inclusive nature of the word "conviction" in the Mississippi statute has led the legislature to create an exception to the general rule permitting cross-examination and contradiction with respect to certain traffic violations. Convictions for the violation of traffic regulations which are punishable as misdemeanors may not be inquired about or shown by other evidence for impeachment purposes.[56] The basis of the exception is that convictions for violation of traffic regulations have little, if any, bearing on the veracity of a witness.[57] Presently, convictions for even the most serious traffic offenses, such as driving while intoxicated,[58] and reckless driving,[59] are punishable as misdemeanors and may

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[50]Miss. Code Ann. § 1693 (1956).

[51]*Id.* § 674; Lewis v. State, 85 Miss. 35, 37 So. 497 (1904); Helm v. State, 67 Miss. 562, 7 So. 487 (1890).

[52]*E.g.*, Simmons v. State, 241 Miss. 481, 130 So. 2d 860 (1961).

[53]Breland v. State, 221 Miss. 371, 73 So. 2d 267 (1954); Williams v. State, 87 Miss. 373, 39 So. 1006 (1906); Lewis v. State, 85 Miss. 35, 37 So. 497 (1904); Helm v. State, 67 Miss. 562, 7 So. 487 (1890).

[54]T. McElroy, Mississippi Evidence § 188, at 519 (1955).

[55]McCormick § 43, at 86; 3A Wigmore § 980.

[56]Miss. Code Ann. § 8280 (1956) provides: "The conviction of a person upon a charge of violating any provision of this Act or other traffic regulation less than a felony shall not affect or impair the credibility of such person as a witness in any civil or criminal proceeding."

[57]Jones v. State, 268 So. 2d 348, 350 (Miss. 1972).

[58]Miss. Code Ann. § 8175-06 (Supp. 1972).

[59]Miss. Code Ann. § 8175 (1956).

not be shown. The effect of the exception is to preclude any inquiry into traffic offenses for purposes of impeachment.

In the case of juvenile court proceedings, the Mississippi legislature has engrafted a second exception onto the general rule that any conviction of crime may be used for impeachment of credibility.[60] The purpose of the qualification is the protection of juvenile offenders from the lasting stigma attached to delinquency.[61] This policy conflicts with the general function of courts to ascertain the truth upon which the system of trials is based.[62] The need to protect the juvenile from the effects of his previous youthful indiscretion is predominant when the proceeding concerns the juvenile and the prior youth court adjudication is being offered against the juvenile. In this instance cross-examination concerning prior youth court adjudications is forbidden.[63] When, on the other hand, the juvenile is not concerned in the proceeding and the prior adjudication is not being used against him, the need to protect the former juvenile offender is not so strong. Accordingly, in such cases, the policy in favor of ascertainment of truth is stronger than the policy of protection, and cross-examination with respect to prior juvenile court proceedings is allowed.[64]

While this analysis effectuates the policies involved, a major problem remains to be resolved in Mississippi. Section 1693 authorizes cross-examination and contradiction only with respect to convictions for impeachment.[65] At least in the case of defendant-witnesses, the statute must be strictly construed.[66] The sections involving juvenile court proceedings, on the other hand, specifically provide that juvenile court adjudications are not convictions.[67] The Mississippi Supreme Court could not, without doing violence to the rule that section 1693 authorizes examination only as to convictions, so construe the statute as to include juvenile court proceedings.[68] One solution to the problem might be a con-

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[60]MISS. CODE ANN. §§ 7185-09, 7187-09 (Supp. 1972) provide in pertinent part:

> . . . No adjudication upon the status of any child shall . . . be deemed a conviction. The disposition of a child or any evidence given in the court in any proceedings concerning him shall not be admissible against the child in any case or proceeding in any other court. . . .

[61]Hamburg v. State, 248 So. 2d 430 (Miss. 1971).

[62]*See id.*

[63]Stratham v. Blaine, 234 Miss. 649, 107 So. 2d 93 (1958).

[64]Hamburg v. State, 248 So. 2d 430 (Miss. 1971); 3A WIGMORE § 980. *Contra,* MCCORMICK § 43, at 86.

[65]MISS. CODE ANN. § 1693 (1956).

[66]Murray v. State, 266 So. 2d 139 (Miss. 1972); Johns v. State, 255 So. 2d 322 (Miss. 1971); Berry v. State, 212 Miss. 164, 54 So. 2d 222 (1951).

[67]MISS. CODE ANN. §§ 7185-09, 7187-09 (Supp. 1972).

[68]*E.g.,* Barlow v. State, 233 So. 2d 829 (Miss. 1970).

struction of the word "conviction" in the juvenile court statutes on a policy basis which would allow the use of juvenile court adjudications for impeachment. The better solution would be an amendment to section 1693 to include juvenile court adjudications.

Under some circumstances, the pendency of an appeal from the judgment of conviction may preclude cross-examination for impeachment regarding the judgment from which appeal is taken. Most courts allow attacks on the credibility of a witness by showing convictions notwithstanding the pendency of an appeal therefrom.[69] The rationale of this approach is that a conviction is final until reversed; the only effect of the appeal being to stay execution of the judgment pending appeal.[70] In the case of appeals from circuit court, a similar rule grounded on the finality of judgments prevails in Mississippi.[71] A reversal of the conviction shown for impeachment, subsequent to the trial, does not render the cross-examination as to the conviction improper, for the conviction was final at the time the cross-examination took place.[72] After reversal of the conviction appealed from, however, the previous prosecution is not a proper subject for cross-examination to impeach credibility, and the alleged offense may not form the basis of impeachment unless on remand the trial court again enters a judgment of conviction in the case.[73] Since appeals from the county court are reviewed in the circuit court or supreme court on the record,[74] the supreme court may be expected to apply the finality principle to such appeals in a similar manner in holding the use of such convictions permissible pending appeal.

In the case of appeals from justice of the peace, municipal, and police courts, appellate procedure differs in that the appellant is given a trial de novo, and no review on the record takes place.[75] This variation in procedure has been viewed by the supreme court as indicative of the fact that such appeals are not from final judgments, and therefore convictions in these courts may not be used for impeachment pending appeal.[76] Whether the alleged offense may form the basis of impeachment through former conviction depends on the outcome of the trial de novo. If a conviction results in the county or circuit court, the

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[69]Annot., 16 A.L.R.3d 726, 728 (1967).

[70]*Id.* at 728-33.

[71]Nicholson v. State, 254 So. 2d 881 (Miss. 1971).

[72]Annot., 16 A.L.R.3d at 733-35.

[73]*Id.* at 728-33; Nicholson v. State, 254 So. 2d 881 (Miss. 1971) (dictum).

[74]Miss. Code Ann. § 1616 (Supp. 1972).

[75]*Id.* § 1202; Miss. Code Ann. § 1617 (1956).

[76]Harris v. State, 209 Miss. 141, 46 So. 2d 91 (1950).

finality principle indicates that appeals from conviction in the trial de novo would be subject to the same rules as ordinary cases on appeal from these courts. Where the writ of *procedendo* is issued due to lack of prosecution of the appeal, the finality principle would indicate that the conviction may again be used for impeachment because the writ instructs the judge of the justice of the peace, municipal, or police court to proceed with the enforcement of his judgment of conviction.[77]

Another circumstance which may cast doubt on the permissibility of cross-examination and contradiction with respect to a former offense is the existence of a pardon. Some of the collateral effects of a former conviction are terminated by the existence of a pardon.[78] A pardon in itself does not, however, contain any implication of innocence, nor does a pardon modify that character trait which led the witness to commit the offense.[79] Since character itself is relevant, the Mississippi Supreme Court, like the high courts of many other states, has found the existence of a pardon for the offense to be no impediment to the use of the conviction on cross-examination for the impeachment of credibility.[80]

Lapse of time is another contingency which, it has been argued, should render a conviction inadmissible for impeachment purposes. Such an argument misconceives the purpose behind impeachment by prior conviction. The mere passage of time does not necessarily indicate that a witness has reformed, even though it does constitute a factor in favor of the witness.[81] Most courts have indicated that the question of the admissibility of a conviction for impeachment of credibility is in the discretion of the trial judge, who may forbid the use of the conviction where he feels that the conviction is not, under the circumstances, indicative of the present character of the witness.[82] In the exercise of discretion in this matter, the trial judge should consider not only the lapse of time since the conviction, but also the length of imprisonment, subsequent conduct, age, and intervening circumstances of the witness.[83] A few courts have rejected the proposition that remoteness is a question

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[77]An explanation of the use of the writ of *procedendo* may be found in Murphy v. State, 223 Miss. 290, 78 So. 2d 342 (1955).

[78]MISS. CODE ANN. § 2563 (1956).

[79]Stratham v. Blaine, 234 Miss. 649, 107 So. 2d 93 (1958); *accord,* 3A WIGMORE § 980, at 833.

[80]Stratham v. Blaine, 234 Miss. 649, 107 So. 2d 93 (1958); MCCORMICK § 43, at 87; Annot., 30 A.L.R.2d 893 (1953).

[81]*See* Shorter v. State, 257 So. 2d 236 (Miss. 1972); Simmons v. State, 241 Miss. 481, 130 So. 2d 860 (1961).

[82]MCCORMICK § 43, at 87.

[83]Sibley v. Jeffreys, 76 Ariz. 340, 264 P.2d 831, 833-34 (1953).

of admissibility and regard remoteness of the conviction as affecting only the weight which the jury will accord the prior conviction.[84]

Prior decisions in this state should not be regarded as rejecting the position that remoteness is a consideration of admissibility in the discretion of the trial judge.[85] Since indications of reform were absent in these cases, the opinions should be read only as rejecting the contention that bare passage of time, without more, is sufficient to render a conviction inadmissible as too remote. If a showing can be made that the witness today is not the same man, characterwise, as the one who was convicted of a crime, there is little, if any, profit in showing his past mistakes to the jury. Such errors are simply not indications of present character, which is the relevant consideration.[86]

III. Scope of Inquiry

Section 1693 authorizes only a limited cross-examination and contradiction designed to demonstrate the existence of a conviction.[87] The discrediting fact under statutes relating to impeachment by prior conviction is the conviction itself, not the evidentiary facts upon which the conviction was obtained.[88] These evidentiary facts, or details, add little to the inquiry so far as impeachment by prior conviction is concerned and contain a capacity for confusion of the issues before the jury and in some cases contain a capacity for prejudice.[89] In phrasing his questions, the cross-examiner should exercise care to avoid eliciting details of the prior offense from the witness, for the Mississippi Supreme Court has reversed on this basis when prejudice appears.[90] Since interrogation of a defendant on the stand as to a prior conviction has capacity for prejudice, the Mississippi court has even reversed one case where it appeared that, in fact, the witness had not been convicted of the offense inquired about.[91] Accordingly, great care should be exercised to insure that defendant-witnesses have actually been convicted before any cross-examination takes place.

When the cross-examiner desires to attempt to impeach credibility by showing a prior conviction, he should begin by asking the witness if

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[84]*E.g.*, State v. Robington, 137 Conn. 140, 75 A.2d 394 (1950).

[85]*See* Shorter v. State, 257 So. 2d 236 (Miss. 1972).

[86]*See* McCormick § 43, at 87.

[87]Lawson v. State, 161 Miss. 719, 138 So. 361 (1931).

[88]Powers v. State, 156 Miss. 316, 126 So. 12 (1930); Walker v. State, 151 Miss. 862, 119 So. 796 (1929); *see* Miss. Code Ann. § 1693 (1956).

[89]McCormick § 43, at 88; *see, e.g.*, Powers v. State, 156 Miss. 316, 126 So. 12 (1930).

[90]*E.g.*, Powers v. State, 156 Miss. 316, 126 So. 12 (1930).

[91]Murphy v. State, 226 So. 2d 755 (Miss. 1969).

he has ever been *convicted* of any crime other than traffic violations.[92] If the witness is a party to the proceeding, the initial question should also exclude any juvenile court adjudications against the witness.[93] The phrasing of the question may assume tremendous importance, since inquiries as to how many times the witness has been raided[94] or charged, for example, are improper since they do not elicit testimony concerning a prior conviction. Initial questions which fail to convey adequately the idea that convictions are the subject of the inquiry should be avoided because of their propensity to elicit prejudicial matter.[95]

If the witness acknowledges the existence of former convictions, further inquiry is permissible to show the identity of the offenses[96] and the dates of conviction.[97] Further questioning concerning the convictions is impermissible.[98] Hence, no questions may be asked concerning the punishment imposed,[99] the identity of the victim,[100] or other details.[101]

Suppose that in the scope of a proper cross-examination, the answers disclose details which were not inquired of the witness. Logically, the cross-examiner should not be penalized for the unresponsive answers to his questions. Therefore, where a witness supplies details not called for by the questions, no error of a prejudicial nature exists.[102]

Despite the prejudicial character which details may assume, the Mississippi Supreme Court has indicated that not all inquiries which incorporate detail are impermissible. Where a witness does not recall an offense of which he has been convicted, or is reluctant to disclose the

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[92]The exclusion of traffic violations is based on the prohibition contained in MISS. CODE ANN. § 8280 (1956).

[93]The exclusion of juvenile court convictions is based on the provisions of MISS. CODE ANN. §§ 7185-09, 7187-09 (Supp. 1972).

[94]Ivey v. State, 206 Miss. 734, 40 So. 2d 609 (1949).

[95]*See* Cooksey v. State, 175 Miss. 82, 166 So. 388 (1936); Dodds v. State, 92 Miss. 230, 45 So. 863 (1908).

[96]Brooks v. State, 192 Miss. 121, 4 So. 2d 886 (1941); Hartfield v. State, 186 Miss. 75, 189 So. 530 (1939); Peacock v. State, 174 So. 582 (Miss. 1937); Lawson v. State, 161 Miss. 719, 138 So. 361 (1931); Bufkin v. Grisham, 157 Miss. 746, 128 So. 563 (1930); Powers v. State, 156 Miss. 316, 126 So. 12 (1930).

[97]Simmons v. State, 241 Miss. 481, 130 So. 2d. 860 (1961).

[98]*See* Emily v. State, 191 So. 2d 925 (Miss. 1966) (dictum); White v. State, 202 Miss. 246, 30 So. 2d 393 (1947); Powers v. State, 156 Miss. 316, 126 So. 12 (1930).

[99]Murray v. State, 266 So. 2d 139 (Miss. 1972); Powell v. State, 195 Miss. 161, 13 So. 2d 622 (1943); Hartfield v. State, 186 Miss. 75, 189 So. 530 (1939); Roney v. State, 167 Miss. 532, 142 So. 475 (1932).

[100]Berry v. State, 212 Miss. 164, 54 So. 2d 222 (1951); Walker v. State, 151 Miss. 862, 119 So. 796 (1929).

[101]*E.g.*, Lawson v. State, 161 Miss. 719, 138 So. 361 (1931).

[102]Smith v. State, 217 Miss. 123, 63 So. 2d 557 (1953); Bufkin v. Grisham, 157 Miss. 746, 128 So. 563 (1930).

offense, the cross-examiner may lead the witness by incorporating detail into his questions in order to refresh the memory of the witness or to press the reluctant witness to answer.[103] Similarly, where the witness seeks to clarify a question by asking what conviction is being referred to, the cross-examiner may state details in order to direct the attention of the witness to the conviction about which information is sought.[104] These exceptions allowing the use of detail should not be viewed as a license to incorporate highly prejudicial matter into leading questions. Prejudicial detail in leading questions contains no less of a capacity to inflame the jury than the same prejudicial matter coming from the mouth of the witness.

In cases where the witness sought to be impeached has multiple convictions, the problem may become even more acute. Each and every prior conviction may be shown in order to persuade the jury that the witness is unworthy of belief.[105] The prior convictions which may be shown include all those occurring up to the time the witness takes the stand.[106] If a witness has an extensive record, even a cooperative witness may encounter difficulty in recalling the identity and dates of all prior convictions. In these cases, the cross-examiner likewise has a right to incorporate details of a non-prejudicial nature into leading questions in order to refresh the memory of the witness and press uncooperative witnesses for answers.[107]

The supreme court's resolution of the conflicting policies involved in the question of whether details may be utilized by the cross-examiner may not be the optimum solution to the problem. Certainly, all details have some capacity for confusion of issues and, in addition, such details may be prejudicial. The supreme court, in allowing detail to be used to refresh memory, has accepted the risk that the jury will be confused, placing primary emphasis on the prejudicial nature of the information contained in the leading questions.[108] In doing so the supreme court has ignored the risk that the jury, unaware that the details are not the impeaching evidence, will consider the details embodied in the leading questions on the subject of credibility. Although a certain degree of time and trouble is saved by securing the witness's admission of his former conviction, other avenues are available for the proof of the former conviction. Where the witness denies that he has been convicted

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[103]Smith v. State, 217 Miss. 123, 63 So. 2d 557 (1953).

[104]Emily v. State, 191 So. 2d 925 (Miss. 1966).

[105]Brown v. State, 96 Miss. 534, 51 So. 273 (1910).

[106]Marlowe v. State, 27 So. 2d 769 (Miss. 1946).

[107]Mangrum v. State, 232 So. 2d 703 (Miss. 1970); Dorroh v. State, 229 Miss. 315, 90 So. 2d 653 (1956).

[108]*See* Mangrum v. State, 232 So. 2d 703 (Miss. 1970).

of one or more former offenses, the cross-examiner may simply use extrinsic evidence to establish the conviction.[109] In the absence of necessity, the better means of proceeding is to avoid injecting detail into the trial at all, by prohibiting leading questions which contain details.

In one category of cases, necessity does dictate that some method be devised to bring before the jury the identity of the offense. Where the witness admits numerous convictions but is unable to recall all of his offenses, other evidence of the conviction is inadmissible to show the conviction because such evidence would not contradict the answers of the witness.[110] In this area an attempt to jar the witness's memory would seem justified, provided the detail used in the questions was not prejudicial. Any other procedure would, in effect, preclude the jury from knowing anything about the witness's conviction.

Assuming, on the other hand, that the witness denies the existence of one or more of his former convictions, what course of action is open to the cross-examiner? In this case, the witness's response may be contradicted by the introduction of other evidence of the conviction.[111] This denial by the witness of the former conviction is essential to the admissibility of evidence of the conviction from other sources.[112]

What form of evidence is admissible to contradict an assertion by a witness that he has not been convicted of any crime, other than any which he may have admitted? The Mississippi Supreme Court has consistently held the record of conviction admissible to contradict the witness, even in misdemeanor cases.[113] Such a position is in accordance with the general rule requiring proof of judicial records by copy in preference to recollection testimony because of the ease of access to and greater reliability of such records.[114] On a number of occasions, the supreme court has recognized that the best evidence of a conviction is a copy of judicial records.[115]

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[109]MISS CODE ANN. § 1693 (1956).

[110]Mathews v. State, 243 Miss. 568, 139 So. 2d 386 (1962).

[111]MISS. CODE ANN. § 1693 (1956).

[112]Berry v. State, 212 Miss. 164, 54 So. 2d 222 (1951) (dictum); Alabama & V.R.R. v. Thornhill, 106 Miss. 367, 63 So. 674 (1913); Cook v. State, 85 Miss. 738, 38 So. 110 (1905).

[113]Hardin v. State, 232 Miss. 470, 99 So. 2d 600 (1958) (misdemeanor); Breland v. State, 221 Miss. 371, 377, 73 So. 2d 267, 268-69 (1954) (dictum) (misdemeanor); Berry v. State, 212 Miss. 164, 172, 54 So. 2d 222, 225 (1951) (dictum); Powers v. State, 156 Miss. 316, 126 So. 12 (1930) (dictum); Helm v. State, 67 Miss. 562, 7 So. 487 (1890).

[114]MCCORMICK § 241; 4 WIGMORE §§ 1269-70.

[115]*See* McGowan v. State, 269 So. 2d 645 (Miss. 1972); Brown v. State, 222 Miss. 863, 77 So. 2d 694 (1955); Outlaw v. State, 208 Miss. 13, 43 So. 2d 661 (1949).

In *Rowe v. State*,[116] the Mississippi Supreme Court cast doubt on the proposition that proof of a conviction must be accomplished through proof of the record of conviction, rather than through recollection testimony. On cross-examination, a witness admitted to prior convictions for gambling, speeding, and drinking, but denied that he had been convicted of any other offenses.[117] Over objection of the defendant's counsel, a city clerk was called who testified concerning a number of convictions which the witness had not admitted on cross-examination. Although the docket of the police court was not introduced, the supreme court found no error in the procedure.[118] The supreme court directed no discussion to the question of the manner in which the witness was contradicted, but disposed of the objection on the basis that the examination of the clerk did not disclose detail.[119] While the argument could be made that the supreme court by inference held that recollection testimony is a permissible mode of contradiction, it does not appear reasonable that a decision of such importance would be made without any discussion at all. Therefore, it may be safely assumed that, in the absence of circumstances constituting an excuse, the conviction must be shown by proof of the record of conviction, rather than by recollection testimony.

IV. Conclusion

Several conclusions of a general nature may be drawn from the foregoing analysis of the use of prior convictions for impeachment in Mississippi. The first conclusion is simply that the statute authorizes cross-examination only as to convictions. A conviction exists under the statute only upon rendition of a judgment. Once these two criteria have been met, any crime other than traffic violations or juvenile court adjudications against a party witness may be shown for impeachment of credibility. The crime may be shown by the testimony of the witness himself or, where the witness denies the existence of the conviction, by a copy of the judgment of conviction.

Two areas merit consideration by the legislature and the supreme court with a view to modification of the existing law. The legislature should seriously consider the amendment of section 1693 to include juvenile court adjudications. Once included, the question of whether such adjudications are convictions will be moot when offered for impeachment purposes. The supreme court should consider further limi-

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[116]242 Miss. 499, 136 So. 2d 220 (1962).

[117]*Id.* at 505, 136 So. 2d at 223.

[118]*Id.* at 506-07, 136 So. 2d at 223.

[119]*Id.* at 507, 136 So. 2d at 223.

tation of existing rules relating to the use of detail in leading questions to refresh witnesses' memories. The possible abuse of the right of cross-examination with respect to prior convictions is too strong to ensure the even-handed administration of justice in these cases. The better approach would be to minimize prejudice and confusion of issues by permitting leading questions which include detail only where ncessary to show the conviction at all.

David S. Raines

CONSTITUTIONAL LIMITATIONS OF PRISONERS' RIGHT TO MEDICAL TREATMENT

In recent years the courts, particularly the federal courts, have begun to abandon the "hands-off" doctrine[1] when faced with prisoners' allegations of mistreatment by prison officials.[2] One area of prisoner complaint which has been affected by this increased judicial scrutiny is inmate access to medical treatment.

Although a duty to provide medical treatment to those confined has long been recognized,[3] it has often been very difficult to enforce, and remedies for its breach have been largely illusory.[4] The only remedy utilized to any great extent prior to recent years is the damage suit in state court against prison officials for bodily injury arising out of a breach of duty to provide medical care.[5] An inmate desiring to bring

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[1]The "hands-off" doctrine is a judicially self-imposed restraint against hearing inmate complaints of mistreatment. The justification for the doctrine most frequently given by courts is the separation of powers; *i.e.*, that judicial review of administrative decisions would hamper prison discipline or jeopardize the authority of prison officials. *E.g.*, Powell v. Hunter, 172 F.2d 330 (10th Cir. 1949); Golub v. Krimsky, 185 F. Supp. 783 (S.D.N.Y. 1960). Underlying this reluctance to interfere is the often articulated fear that it would be unwise for judges to attempt to substitute their judgment on internal prison matters for that of prison officials who presumably are trained in prison management. Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 522 (1963). For additional discussions of the "hands-off" doctrine *see* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473 (1971); Comment, *Judicial Limitations Upon Discretionary Authority in the Penal Process*, 8 CALIF. W.L. REV. 505 (1972); Note, *Recent Applications of the Ban on Cruel and Unusual Punishments: Judicially Enforced Reform of Nonfederal Penal Institutions*, 23 HAST. L.J. 1111 (1972).

[2]*E.g.*, Cruz v. Beto, 405 U.S. 319 (1972); Johnson v. Avery, 393 U.S. 483 (1969).

[3]Some states, for example, have statutes which impose a duty of care on jailers. *See, e.g.*, the statutes cited in Zalman, *Prisoners' Rights to Medical Care*, 63 J. CRIM. L.C. & P.S. 185-87 nn.11-13 (1972). In other states, there is a common law duty "to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself." Spicer v. Williamson, 191 N.C. 487, 132 S.E. 291, 293 (1926). For a discussion of cases dealing with the statutory and common law duty of the jailer to furnish medical care, *see* Sneidman, *Prisoners and Medical Treatment: Their Rights and Remedies*, 4 CRIM. L. BULL. 450, 451-56 (1968).

[4]*See generally* Comment, *Beyond the Ken of the Courts*, *supra* note 1, at 507-08.

[5]Annot., 14 A.L.R.2d 353, 367-70 (1950); *see* Sneidman, *supra* note 3, at 451-56. Federal prisoners may sue for negligent treatment under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 (1970). Muniz v. United States, 374 U.S. 150 (1963). From 1963-1968, Justice Department statistics indicate that 142 suits were filed by prisoners under the Act, 19 of which were settled with awards

such a suit, however, must often face rather formidable procedural and legal obstacles. In some states, for example, the doctrine of civil death prevents prison inmates from bringing civil suits.[6] Even where suit is permitted, an inmate may run into additional difficulties. He may be denied the right to appear in court to represent himself; witnesses, who are often inmates themselves, may be difficult to obtain because of administrative pressure brought to prevent testimony against the prison or because they have been released or transferred to other institutions.[7] Furthermore, because of their convictions, their testimony may not carry as much weight with the jury as that of prison administrators.[8] Lastly, even if these obstacles were to be overcome, such suits are simply not economically feasible except in cases where serious injury or death results.

With the demise of the "hands-off" doctrine in prisoners' rights litigation, however, the federal courts have begun to fashion new remedies under habeas corpus[9] and civil rights legislation,[10] which may eventually prove to be more helpful to inmates than the traditional tort suit. The purpose of this comment will be to discuss emerging constitu-

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ranging from $750 to $110,000. Eighty-five were dismissed, and, as of August 15, 1968, 38 were still pending. F. COHEN, THE LEGAL CHALLENGE TO CORRECTIONS: IMPLICATIONS FOR MANPOWER AND TRAINING 74 n.52 (1969).

[6]At common law, prisoners were said to lack capacity to sue. For discussion of the problems facing an inmate desiring to bring a civil suit, *see The Collateral Consequences of a Criminal Conviction,* 23 VAND. L. REV. 929, 1018-30 (1970).

[7]Comment, *Beyond the Ken of the Courts, supra* note 1, at 553.

[8]Sneidman, *supra* note 3, at 459.

[9]28 U.S.C. §§ 2241-55 (1970). Originally habeas corpus was only used to challenge the legality of the detention. McNally v. Hill, 293 U.S. 131, 139 (1934), *overruled,* Peyton v. Rowe, 391 U.S. 54 (1968). In 1944, however, the Sixth Circuit, in Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), permitted the use of the writ to challenge conditions of imprisonment. Since that time more and more courts have followed the *Coffin* rationale, and the Supreme Court in 1969, in Johnson v. Avery, 393 U.S. 483 (1969), approved such use of the writ. Not all courts, however, have adopted this broad use of habeas corpus. *See generally Development in the Law—Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1079-87 (1970).

[10]42 U.S.C. §1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

Section 1983 is limited to actions under color of state law and cannot, therefore, be used by federal prisoners. 28 U.S.C. § 1331 (1970) grants federal jurisdiction over cases involved the Constitution or federal statutes, but requires a $10,000 jurisdictional amount. For additional discussion *see* Goldfarb & Singer, *supra* note 1, at 264-65.

tional standards of review utilized by the federal courts in reviewing prisoners' allegations of denial of medical treatment.[11]

In order to state a claim arising under habeas corpus or section 1983, an inmate must allege facts sufficient to show a denial of medical care which amounts to a violation of a right secured by the Federal Constitution or laws.[12] The majority of complaints allege a violation of the eighth amendment right to be free of "cruel and unusual" punishments,[13] although a few inmates have urged that such deprivation violates rights secured under the 14th amendment.[14]

The problem thus far in dealing with individual inmate complaints regarding medical care has been the reluctance of the courts to interfere with the decisions of prison administrators and doctors with regard to treatment. Originally this reluctance was formulated in terms of the "hands-off" doctrine — courts would not interfere in the internal operation and administration of the prison.[15] Although it is now well settled

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[11]Exhaustion of state remedies is not necessary under section 1983. Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1968). Furthermore, compensation for damages may be secured under section 1983. *E.g.*, Sostre v. McGinnis, 442 F.2d 178, 204-05 (2d Cir. 1971), *cert. denied sub. nom.* Sostre v. Oswald, 405 U.S. 978 (1972). Thus the majority of cases challenging medical treatment are brought under this section, rather than habeas corpus. Most of these have been challenges by individual inmates rather than class actions attacking practices on an institution-wide scale. *E.g.*, Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972); Riley v. Rhay, 407 F.2d 496 (9th Cir. 1969); Mayfield v. Craven, 299 F. Supp. 1111 (E.D. Cal. 1969); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965), *aff'd*, 433 F.2d 873 (9th Cir. 1970).

[12]*E.g.*, Ramsey v. Ciccone, 310 F. Supp. 600, 604 (W.D. Mo. 1970).

[13]*E.g.*, United States v. Fitzgerald, 466 F.2d 377 (D.C. Cir. 1972); Startz v. Cullen, 468 F.2d 560 (2d Cir. 1972); Black v. Ciccone, 324 F. Supp 129 (W.D. Mo. 1970); Faught v. Ciccone, 283 F. Supp. 76 (W.D. Mo. 1966). *See generally* Singer, *Bringing the Constitution to Prison: Substantive Due Process and the Eighth Amendment*, 39 U. CIN. L. REV. 650 (1970).

[14]*E.g.*, Startz v. Cullen, 468 F.2d 560 (2d Cir. 1972); Riley v. Rhay, 407 F.2d 496 (9th Cir. 1969).

[15]*See* note 1 *supra*. In United States *ex rel.* Lawrence v. Ragen, 323 F.2d 410, 412 (7th Cir. 1963), the Seventh Circuit, rejecting an inmate complaint against officials for inadequate medical care, held:

> State prison officials must of necessity be vested with a wide degree of discretion in determining the nature and character of medical treatment to be afforded state prisoners. It is not the function of federal courts to interfere with the conduct of state officials in carrying out such duties under state law.

Again, in Haskew v. Wainwright, 429 F.2d 525, 526 (5th Cir. 1970), allegations that the petitioner was denied emergency treatment and remedial surgery were held not to state a claim upon which relief could be granted because:

> Federal courts will not inquire into adequacy or sufficiency of medical care of state prison inmates unless there appears to have been an abuse of the broad discretion which prison officials possess in this area.

that deprivations of constitutional rights fall within an exception to the "hands-off" doctrine,[16] the courts have continued to encounter difficulty in formulating a test for deprivation of medical treatment which rises to the level of a constitutional violation. One of the most frequently applied tests is that the deprivation must be "shocking" to the conscience of society in order to deprive the petitioner of rights secured by the eighth or 14th amendments.[17] In applying this standard, many courts began to make a distinction between a *total* denial of medical treatment and medical treatment which is merely *inadequate* or *improper*.[18]

Not until recently have courts begun to speak in terms of a prisoner's right to reasonable or adequate medical care.[19] Most of the latest cases recognize that where prison officials deny medical treatment which has been ordered by a physician, there has been a denial of the prisoner's right to adequate or reasonable medical attention.[20] Courts are still

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[16]*See* note 1 *supra*.

[17]*E.g.*, Startz v. Cullen, 468 F.2d 560, 561 (2d Cir. 1972); United States *ex rel.* Hyde v. McGinnis, 429 F.2d 864, 866 (2d Cir. 1970). For discussion of traditional tests used by courts in applying the eighth amendment *see* Singer, *supra* note 13.

[18]*E.g.*, Coppinger v. Townsend, 398 F.2d 392, 394 (10th Cir. 1968) ("A claim of total denial of medical care differs from a claim of inadequacy of medical care."); Argentine v. McGinnis, 311 F. Supp. 134, 137-38 (S.D.N.Y. 1969) (complaint dismissed where petitioner claimed only inadequate treatment); Austin v. Harris, 226 F. Supp. 304, 308-09 (W.D. Mo. 1964) (hearing granted on basis of allegations that inmate had "bone arthritis" and was kept 13 months without "treatment of any kind").

[19]*E.g.*, Campbell v. Beto, 460 F.2d 765, 768 (5th Cir. 1972) ("deprivation of basic elements of adequate medical treatment" is unconstitutional); Blanks v. Cunningham, 409 F.2d 220, 221 (4th Cir. 1969) (prisoner entitled to "reasonable" medical care); *accord*, Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); Gates v. Collier, 349 F. Supp. 881, 894 (N.D. Miss. 1972) (inmates entitled to "adequate provision for their physical health and well-being"); Newman v. Alabama, 349 F. Supp. 278, 281 (M.D. Ala. 1972) (prisoners entitled to "basic elements of adequate medical treatment"); Collins v. Schoonfield, 344 F. Supp. 257, 277 (D. Md. 1972) (jailer must "provide reasonable medical assistance to inmates including a reasonable medical examination, access to sick call; treatment for special medical problems; proper dental attention; adequate suicide prevention techniques"); Jones v. Wittenberg, 330 F. Supp. 707, 718 (N.D. Ohio 1971), *aff'd sub. nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (ordered "adequate" medical care furnished); Sawyer v. Sigler, 320 F. Supp. 690 (D. Neb. 1970), *aff'd per curiam*, 445 F.2d 818 (8th Cir. 1971) (state must furnish adequate treatment); Ramsey v. Ciccone, 310 F. Supp. 600, 604 (W.D. Mo. 1970) (improper or inadequate treatment which violates the eighth amendment "must be continuing, must not be supported by any competent, recognized school of medical practice and must amount to a denial of needed medical treatment"); Talley v. Stephens, 247 F. Supp. 683, 687 (E.D. Ark. 1965), *aff'd*, 433 F.2d 873 (9th Cir. 1970) (inmates "entitled to demand reasonable medical attention for injuries and disabilities at all reasonable times, and to attendance at sick calls at reasonable times").

[20]*E.g.*, Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972) (dismissal was incorrect where complaint alleged that inmate, a heart patient, was forced to do heavy work,

reluctant to interfere, however, where "a difference of opinion exists between the lay wishes of the patient and the professional diagnosis of the doctor,"[21] or in instances of mere negligent malpractice.[22] In other words, the prison physician is increasingly becoming the supreme arbiter of when and in what form medical treatment should be given and of whether treatment, if given, was in fact adequate.

This reliance on the prison doctor as the only person with sufficient competence to determine when adequate care is being given seems to be but another variation of the "hands-off" doctrine which defers to prison officials administrative matters in which the courts lack expertise. As such, it is fraught with the same possibilities of abuse which led the courts increasingly to reject that doctrine in other areas of prisoners' rights litigation. One commentator succinctly described these abuses in writing of the need for a rejection of the doctrine in other areas, noting a need for

> recognition by the courts of the ego involvement of prison officials in covering up abuses, coupled with an awareness of the community of interest among prison employees and the relationship of personal advancement to continual vindication in all conflicts with inmates. . . .[23]

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denied medicine prescribed by his physician and placed on a restricted diet without medicine in contravention of doctor's order); Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970) (claim allowed against warden who refused to allow prisoner to receive medication authorized by prison doctor and sent to inmate from druggist outside of prison); Black v. Ciccone, 324 F. Supp. 129 (W.D. Mo. 1970) (where chief of surgery certified that petitioner was unfit to work in barbershop, it was eighth amendment violation to keep him there); Sawyer v. Sigler, 320 F. Supp. 690, 693 (D. Neb. 1970), *aff'd*, 445 F.2d 818 (8th Cir. 1971) (courts should be guided by physician's statement that medical treatment was inadequate).

[21] *E.g.*, Cates v. Ciccone, 422 F.2d 926 (8th Cir. 1970) (courts should rely on reports of reputable prison physicians); Coppinger v. Townsend, 398 F.2d 392, 394 (10th Cir. 1968); Lee v. Stynchcombe, 347 F. Supp. 1076, 1080-81 (N.D. Ga. 1972) (court relies on doctor's affadavit); Tyerina v. Ciccone, 324 F. Supp. 1265 (W.D. Mo. 1971) (based on court-appointed consultant and prison doctor's uncontradicted affadavit, no denial); Prewitt v. Arizona *ex rel.* Eyman, 315 F. Supp. 793 (D. Ariz. 1969) (no denial based on doctor's affadavit); Mayfield v. Craven, 299 F. Supp. 1111 (E.D. Cal. 1969) (court should not second-guess physician as to propriety of treatment); Willis v. White, 310 F. Supp. 205 (E.D. La. 1970); Ayers v. Ciccone, 300 F. Supp. 568 (W.D. Mo. 1968), *cert. denied*, 396 U.S. 943 (1968).

[22] *E.g.*, Ramsey v. Ciccone, 310 F. Supp. 600, 605 (W.D. Mo. 1970).

[23] Comment, *Beyond the Ken of the Courts*, *supra* note 1, at 529. *See also* Zalman, *supra* note 3, at 198:

> There is a real danger that the relatively sheltered position of a prison doctor will attract those seeking primarily a civil service sinecure, but there is a greater danger that the long exercise of power over the powerless will destroy those attributes of physicans which are necessary for quality medical care.

Thus far there has been little recognition by the courts that prison doctors are officials of the prison and as such are subject to the same pressures and needs for personal justification as are other administrators — particularly where an inmate may be suing the doctor for damages for inadequate treatment.[24]

A study of California's prison medical facilities,[25] for example, found "that far too many valid cases of illness or injury are not believed or are misdiagnosed;"[26] proper diets were often unavailable or denied by doctors to patients suffering from chronic illness or disease;[27] emergency procedures were sometimes poor;[28] and staff members, including some doctors, were "calloused and frequently hostile" towards inmates registering complaints.[29] In fact, complaints against one doctor in the system ranged from overriding other doctors' orders and failure to adequately diagnose or treat patients who were disciplinary problems, to attempting "to impress his own religious beliefs on inmates by telling them that faith would heal their medical ailments."[30] The committee conducting the study felt strongly enough about the charges against the doctor to recommend his removal "[i]f, but a fraction of the innumerable allegations made against [him] are true. . . ."[31]

It is difficult to know exactly how widespread such conditions are in our nation's prisons because of the sparsity of any information on medical practice within penal institutions. Although the American Medical Association in cooperation with the American Bar Association's Committee on Correctional Facilities and Services is currently studying prison medical facilities in an attempt to develop guidelines and improve services,[32] the last national survey of prison medicine took place in 1929.[33] Recent cases[34] and studies[35] of individual prison systems indi-

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[24]*See* cases cited note 21 *supra*.

[25]ASSEMBLY SELECT COMMITTEE OF PRISON REFORM AND REHABILITATION, AN EXAMINATION OF CALIFORNIA'S PRISON HOSPITALS (1972).

[26]*Id.* at 16.

[27]*Id.* at 24, 29, 40, 45, 53, 64.

[28]*Id.* at 17.

[29]*Id.* at 60-62.

[30]*Id.* at 61

[31]*Id.* at 62.

[32]11 CRIM L. REP. 2102 (1972).

[33]F. RECTOR, HEALTH AND MEDICAL SERVICE IN AMERICAN PRISONS AND REFORMATORIES (1929), *cited in* Zalman, *supra* note 3, at 198.

[34]*E.g.*, Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972); Collins v. Schoonfield, 344 F. Supp. 257, 267-70 (D. Md. 1972); Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs, Civil No. 173-217 (Cir. Ct., Wayne County, Mich., May 18, 1971).

[35]Reports cited at notes 1 and 2 of CALIFORNIA'S PRISON HOSPITALS, *supra* note 25.

cate, however, that conditions similar to the ones existing in California's prisons may be prevalent in many penal institutions and that medical facilities and personnel are not equipped to handle the medical problems of a substantial portion of the inmate population. At any rate, allegations of mistreatment such as those detailed above are frequent in inmate complaints.[36]

Although it may be true that many inmates are malingerers and that their complaints are clearly frivolous,[37] placing complete reliance on the prison doctor's testimony that efficient treatment has been rendered can work to deny other inmates their constitutional right to adequate treatment and cause them severe harm or discomfort. In only two cases thus far has a federal court, in dealing with an individual's complaint, appointed a physician to make an independent assessment of the adequacy of treatment.[38] Because of the time and expense involved in such a method, it seems unlikely that many courts will adopt such a practice, particularly in cases where the risk of serious injury is not apparent. Nevertheless, where substantial harm or discomfort might result to the inmate if the doctor's treatment is incorrect, the best way to insure that the inmate is not being deprived of his right to medical treatment is to resort to an independent assessment of the prison physician's diagnosis. Another way would be to allow inmates to consult with their own doctors when they feel they have been mistreated.[39]

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[36]*E.g.*, Haskew v. Wainwright, 429 F.2d 525 (5th Cir. 1970) (alleges inadequate emergency treatment); Weaver v. Beto, 429 F.2d. 505 (5th Cir. 1970) (alleges prejudice by doctor); United States *ex rel.* Lawrence v. Ragen, 323 F.2d 410 (7th Cir. 1963) (claims harrassed at hospital); Rhinehart v. Rhay, 314. F. Supp. 81 (W.D. Wash. 1970) (complains given sedatives against will); Mayfield v. Craven,, 299 F. Supp. 1111 (E.D. Cal. 1969) (alleges inadequate emergency treatment); Medlock v. Burke, 285 F. Supp. 67 (E.D. Wis. 1968) (claims race prejudice in administering treatment); Hurley v. Field, 282 F. Supp. 34 (C.D. Cal. 1968) (claims removed from ulcer diet as punishment).

[37]In reviewing inmate complaints, judges frequently voice this fear. *E.g.*, Gates v. Collier, 349 F. Supp. 881, 901 (N.D. Miss. 1972); Collins v. Schoonfield, 344 F. Supp. 257, 277 (D. Md. 1972).

[38]In Tijerina v. Ciccone, 324 F. Supp. 1265 (W.D. Mo. 1971) the court appointed a physician to examine petitioner, and in Ramsey v. Ciccone, 310 F. Supp. 600 (W.D. Mo. 1970) the court required an opinion on the course of treatment from a regular outside consultant to the prison.

[39]Prison regulations normally prohibit inmates from hiring private physicians. Comment, *Prisoner's Rights*, 33 OHIO ST. L.J. 1, 26 (1972). The *Model Penal Code*, however, has an optional provision permitting inmates to hire their own doctors. ABA & COUNCIL OF STATE GOV'TS, COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS IV-27-8 (1972). Case law on the right of an inmate to consult with his own physician is virtually nonexistent; however, in one case, Goodchild v. Schmidt, 279 F. Supp. 149 (E.D. Wis. 1968), the inmate alleged inadequate medical

In some respects, suits brought by pre-trial detainees would seem to have more potential for sparking reform in this area than prisoners' suits. Because of the presumption of innocence which these detainees enjoy,[40] the only legitimate purpose of incarceration is to ensure that the detainee will appear for trial.[41] Therefore, the only sanctions which can be validly imposed against the pre-trial detainee are those which "are absolutely requisite for the purpose of confinement."[42] For this reason, courts, in suits against jails, have been more disposed to find constitutional infirmities in jail conditions and restrictions imposed on pre-trial detainees.[43]

No cases were found that dealt with the right of a pre-trial detainee to consult his own physician. However, for those who would be able to pay or those who could convince an outside doctor to take their cases on a charity basis, allowing private consultations might to some degree eliminate the possibility of mistreatment or misdiagnosis. In view of the constitutional limitations placed on the jailer when dealing with pre-trial detainees, it would seem that denial of such access would be very difficult to justify as being "absolutely requisite for confinement."[44] Furthermore, it is at least arguable that virtually any denial to the detainee of medical treatment available to people out on bail would violate the equal protection clause.[45] However, because individual suits

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treatment and that he was being prevented by prison officials from mailing a letter to the Veterans Administration asking for their help. The court found that these allegations were insufficient to state a claim. In Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970) the court required the prison to allow petitioner to receive medicine from an outside druggist which had been prescribed by a physician prior to the inmate's incarceration.

[40]*E.g.*, Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972); Tyler v. Ciccone, 299 F. Supp. 684 (W.D. Mo. 1969).

[41]Imprisonment before trial "is only for safe custody, and not for punishment...." Jones v. Wittenberg, 323 F. Supp. 93, 100 (N.D. Ohio 1971), *supplemented at* 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1971).

[42]323 F. Supp. at 100.

[43]*E.g.*, Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), *supplemented at* 330 F. Supp. 690 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1971); Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (1971).

[44]For additional discussion on independent medical assessment, *see* SOUTH CAROLINA DEP'T OF CORRECTIONS, THE EMERGING RIGHTS OF THE CONFINED 152-53 (1972).

[45]*See* Collins v. Schoonfield, 344 F. Supp. 257, 265 (D. Md. 1972). The pre-trial detainee

> can only be deprived of the constitutional rights a defendant on bail awaiting trial enjoys to the extent such denial is required to insure that he appears

brought by pre-trial detainees are likely to become moot before hearing,[46] it may be that this remedy will not be a practical one for the large majority of inmates who have been arbitrarily treated.

Although they will not ultimately resolve the question of whether an individual is receiving adequate treatment when a difference of opinion exists between him and the prison physician, class actions challenging an entire system's medical facilities may help to alleviate conditions such as overcrowding, lack of sufficient staff or equipment to function effectively, and problems in sanitation.[47] This might in turn promote a generally higher level of care for inmates and respect between doctor and patient.[48]

One case in particular, *Jones v. Wittenberg*,[49] illustrates the relief which could be secured in regard to jail medical facilities. In *Jones* the court found that health facilities at the Lucas County Jail in Ohio were "primitive";[50] that inmate medical care was provided by one full-time nurse and a part-time doctor; and that dental care consisted only of extractions. In addition, there was no infirmary and little equipment.[51] The court ordered specific relief in terms of services and facilities, including daily sick calls by a physician, medical examinations before cell assignment, examination rooms, treatment rooms, and facilities for curative and preventive dental care.[52]

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at trial and to restrain him from endangering or disrupting the security of the institution in which he is detained, or to deter him, if his conduct has, already caused such danger or disruption, from repeating such conduct.

One court has recently spoken forcefully in applying the equal protection clause to those *convicted* of crimes. The court reasoned that where a statute or regulation distinguishes between those convicted of a crime and those not convicted and where the interest infringed is a "fundamental" one, the burden is on the government to show a compelling interest before the statute or regulation will be justified. Morales v. Schmidt, 340 F. Supp. 544 (W.D. Wis. 1972).

[46]Jones v. Wittenberg, 323 F. Supp. 93, 99 (N.D. Ohio 1971).

[47]Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972); Jones v. Wittenburg, 323 F. Supp. 93 (N.D. Ohio 1971); Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs, Civil No. 173-217 (Cir. Ct., Wayne County, Mich., May 18, 1971).

[48]Respect might also be promoted by creation of an independent ombudsman to deal with prisoner's complaints. *See* CALIFORNIA'S PRISON HOSPITALS, *supra* note 25, at 9.

[49]323 F. Supp. 93 (N.D. Ohio 1971), *supplemented at* 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1971).

[50]323 F. Supp. at 97.

[51]*Id.*

[52]330 F. Supp. at 718.

Two recent cases indicate that similar relief may be forthcoming to prisoners. In *Newman v. Alabama*,[53] state prison inmates brought an action seeking declaratory and injunctive relief, contending that as a class they were deprived of the right to adequate medical treatment in violation of their rights guaranteed under the eighth and 14th amendments. The court agreed and found that the medical facilities were "grossly understaffed";[54] the physical plant and equipment were inadequate; the treatment program was poorly administered; inmates were intentionally denied treatment in many instances by correctional staff members;[55] doctor's orders were rarely carried out; and doctors were frequently unable to give timely and thorough care.[56]

To rectify these conditions, the court ordered, among other things, compliance with the regulations of the Federal Bureau of Narcotics and Dangerous Drugs to limit access to drugs, and inspections by the Fire Marshall and State Board of Health. The court also directed defendants to draw up a plan for updating equipment and increasing staff of the medical facilities. Prison officials were directed to insure that inmates were promptly diagnosed and treated by qualified medical personnel and that they received medication and treatment prescribed by physicians. In addition, the court prohibited officials from punishing inmates for seeking medical treatment.[57]

In *Gates v. Collier*,[58] a suit attacking a wide range of practices at the Mississippi State Penitentiary (Parchman), the federal district court ordered even more specific relief on the issue of medical facilities than the court in *Newman*. After reviewing conditions at Parchman, the court concluded that medical facilities at Parchman were "inadequate,"[59] and that Parchman's approximately 1,900 inmates often failed to receive "prompt or *efficient* medical examination, treatment or medication."[60] The court further found that administrative attitudes "tend to discourage inmates from seeking needed medical assistance."[61]

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[53]349 F. Supp. 278 (M.D. Ala. 1972).

[54]*Id.* at 281.

[55]*Id.*

[56]*Id.* at 284.

[57]*Id.* at 287.

[58]349 F. Supp. 881 (N.D. Miss. 1972).

[59]*Id.* at 888.

[60]*Id.* (emphasis added).

[61]*Id.* For example, sergeants punish inmates if examination fails to reveal obvious illness, and the Superintendent's policy is to threaten such inmates with loss of selling plasma, of good time, or of visiting privileges.

To rectify these deficiencies and abuses, the court ordered that "minimum" health care requirements be met.[62] The prison, to meet that end, was ordered to employ at least three full-time physicians,[63] two full-time dentists, two full-time trained physician assistants, six full-time nurses certified as RN or LPN, one medical records librarian, and two medical clerical personnel. Inmates are not to be used to replace the staff though they can be used to supplement it. In addition, the court instructed the prison to provide the services of a qualified radiologist and pharmacist on a "regular basis."[64] To meet constitutional requirements, medical services must comply with those general standards proposed by the American Correctional Association.[65] Defendants were enjoined from punishing an inmate seeking care without an express determination that he was a malingerer.[66]

Long-range plans for securing adequate medical treatment required by the court include consideration of the feasibility of constructing a complete medical center including a hospital, housing inmates within other state institutions or construction of special wards closely associated with these institutions, and contracting with private hospitals to provide specialized treatment.[67]

In the absence of legislative action in this area,[68] class action suits such as the ones described offer great potential for the improvement of prison medical facilities.[69] Improved facilities can, in turn, lead to broader services for inmates with medical problems. Dental care, for example, need not be confined to extractions,[70] but might include corrective and preventive treatment. It has long been known that functional and cosmetic disfigurements may retard an offender's rehabilitation

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[62]*Id.* at 889.

[63]Until shortly before the suit Parchman had only one doctor. At the time of the suit the prison had hired an additional physician. Unqualified inmate staff had been providing the bulk of treatment. *Id.* at 886.

[64]*Id.* at 901.

[65]*Id.*

[66]*Id.*

[67]*Id.* at 904.

[68]Prison administrators typically cite lack of money as an excuse for unconstitutional conditions. *See, e.g.,* Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971) ("Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights.")

[69]Even where medical conditions themselves do not rise to the level of a constitutional deprivation, they may work to contribute to the overall unconstitutionality of a prison system. *E.g.,* Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969), *aff'd,* 442 F.2d 304 (8th Cir. 1971).

[70]Jones v. Wittenberg, 323 F. Supp. 93, 97 (N.D. Ohio 1971).

efforts.[71] With expanded facilities and the cooperation of surrounding community medical centers and doctors, programs for corrective surgery could be instituted. Then too, with larger and better equipped prison facilities, inmates could be offered excellent job training opportunities in medicine.[72] At the present time, however, inmate medical needs are at a much more fundamental level.

Clearly there is a great need today for improvement in the quality of health care offered in our nation's prisons. In the past few years, riots have broken out in many penal institutions in this country.[73] Almost invariably, lack of adequate medical treatment appeared as an inmate grievance.[74]

The trend of recent decisions in the federal courts on medical care has been toward the position that prisoners have a constitutional right to adequate medical treatment.[75] In order to effectuate that right, several courts have ordered specific relief in terms of facilities.[76] In the absence of grievance procedures within the prison itself, the duty of insuring that this equipment and personnel will effectively serve inmate needs will fall primarily on the federal courts. As long as they continue to cling to the last vestiges of the "hands-off" doctrine and defer the determination of adequacy of treatment to the judgment of the prison physician, the possibility exists that some doctors will abuse that discretion, and prisoners will be without a remedy to enforce their right to care. Whenever serious discomfort or injury could be sustained by an inmate if the doctor's diagnosis is incorrect, the courts should not be reluctant to call for an independent evaluation.[77] To do anything less would be to prove that the prisoner is indeed "a slave of the state."[78]

Julie Ann Epps

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[71]Kurtzberg, Safar, & Mandell, *Plastic Surgery in Corrections,* 33 FED. PROB. 44 (Sept. 1969).

[72]CALIFORNIA'S PRISON HOSPITALS, *supra* note 25, at 9.

[73]*See, e.g.,* Goldfarb & Singer, *supra* note 1, at 176.

[74]*E.g.,* inmates at Attica asked for drug treatment, "adequate medical treatment for every inmate, Spanish speaking doctors or interpreters and access within the institution to outside doctors and dentists at the inmate's own expense." Besharov & Mueller, *The Demands of the Inmates of Attica State Prison and the United Nations Standard Minimum Rules for Treatment of Prisoners: A Comparison,* 21 BUFF. L. REV. 839, 849 (1972).

[75]*See* cases cited note 19 *supra.*

[76]*See* cases cited note 47 *supra.*

[77]*Cf.* Weems v. U.S., 217 U.S. 349, 378 (1910), in which the Court states that the cruel and unusual "clause of the constitution . . . is not fastened to the absolute but may acquire meaning as public opinion becomes enlightened by human justice."

[78]Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

RECENT DECISIONS

CONSTITUTIONAL LAW — ADMINISTRATIVE HEARING — DISMISSED TEACHING ASSISTANT MUST SHOW ACTUAL BIAS TO SUPPORT ALLEGED DENIAL OF DUE PROCESS

Respondent, Mrs. Elizabeth Duke, filed a complaint against North Texas State University (NTSU)[1] alleging that the university violated her constitutional rights of free speech and due process of law in terminating her employment as a teaching assistant[2] because of her profane criticism of the administration and Board of Regents of NTSU.[3] The acting president of NTSU, John Carter, investigated the actions of Mrs. Duke and reported them to the Board of Regents, who advised him to dismiss Mrs. Duke if the charges proved true. After a further investigation, Carter notified Mrs. Duke of her termination by a letter stating the reasons for the termination and advising her of her opportunity for an administrative hearing before the President's cabinet.[4] At the hearing, the cabinet found that Mrs. Duke's dismissal was justified. Mrs. Duke appealed to the Board of Regents, who sustained the cabinet's decision.[5] Mrs. Duke then brought an action in federal district court, alleging abridgement of her right of free speech and a denial of due process because her hearing had not been before an impartial tribunal. The

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[1]The complaint was filed pursuant to 42 U.S.C. §§ 1981 and 1983 (1970), which allows a person denied equal protection or deprived of any constitutional right to bring an action in federal court to secure redress.

[2]She had been employed for 2 previous years and had accepted the University's offer to teach a third year.

[3]Mrs. Duke described her comments as "caustically critical" and of the same tenor as an article she later wrote for Denton's New World Press, Feb. 17-Mar. 2, 1971. That article described the Regents as "members of the ruling class . . . responsible for the exploitation of poor and colored peoples all over the world." It accused the Regents of institutionalizing racism, sexism, militarism, and imperialism, and of being "criminals" whose "crimes are far more serious than motherf.....g." Duke v. North Texas State Univ., 469 F.2d 829, 836 (5th Cir. 1972).

[4]The cabinet included President Carter and three vice-presidents. According to President Carter, this was the first time in his 16 years at NTSU that this procedure had been used. According to the local chapter of American Association of University Professors (AAUP), the University Tenure Committee (made up of faculty representatives) should have heard the case. According to the "Statement on Academic Freedom... [etc.]" which had previously been adopted by the Board of Regents, the Tenure Committee was to hear cases where "a non-tenured member . . . alleges a *prima facie* case of violation of academic freedom in the non-renewal of his contract."

[5]Although a 6-month period elapsed between the Cabinet hearing and the Board hearing, it appears that the Board did not see the record of the first hearing until the day of its hearing. The Board members did see the article described in note 3 *supra*.

district judge ordered NTSU to reinstate Mrs. Duke.[6] On appeal to the Fifth Circuit Court of Appeals, *held,* reversed. A school administrative body cannot be disqualified per se from reviewing the dismissal of a teacher whose criticism had been aimed at that body "solely because" some of its members had participated in investigating the charges and in making the initial dismissal decision. Where actual prejudice is not shown and all procedural requirements have been met, the findings and conclusions of such a body will not be disturbed if supported by substantial evidence. *Duke v. North Texas State University,* 469 F.2d 829 (5th Cir. 1972).

There have been numerous attempts by the courts to define the term "due process of law."[7] According to some definitions, a fair trial or fair hearing is essential to procedural due process.[8] Generally, the courts have required that this hearing be conducted by an impartial tribunal,[9] and that there must not only be impartiality in fact, but also an "appearance of impartiality" so that the litigant knows he has received justice.[10] The question of partiality has arisen in cases heard by a judge with a personal interest in the outcome of the trial;[11] by a jury

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[6]The district judge found that all procedural requirements had been met except the "apparent impartiality" required by Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970). He also found that Mrs. Duke's dismissal seriously violated her right of free speech and that there was no infringement of university interests.

[7]*See, e.g.,* Ownbey v. Morgan, 256 U.S. 94, 110-11 (1921); Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884); Hurtado v. California, 110 U.S. 516 (1884); Davidson v. New Orleans, 96 U.S. 97 (1877); Munn v. Illinois, 94 U.S. 113, 123-24 (1876); Murray's Lessee v. Hoboken Land and Imp. Co., 59 U.S. (18 How.) 272, 276 (1856); Musselwhite v. State, 215 Miss. 363, 370-71, 60 So. 2d 807, 810-11 (1952); Brooks v. State, 209 Miss. 150, 154-55, 46 So. 2d 94, 97 (1950). *See also* Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment,* 78 HARV. L. REV. 746, 750 (1965).

[8]*In re* Murchison, 349 U.S. 133, 136 (1955); Adamson v. California, 332 U.S. 46, 53 (1947); Palko v. Connecticut, 302 U.S. 319, 327 (1937); Iowa Cent. R.R. v. Iowa, 160 U.S. 389, 393 (1896); Davidson v. New Orleans, 96 U.S. 97, 105 (1877); Musselwhite v. State, 215 Miss. 363, 370-71, 60 So. 2d 807, 810-11 (1952); Brooks v. State, 209 Miss. 150, 154-55, 46 So. 2d 94, 97 (1950).

[9]*In re* Murchison, 349 U.S. 133, 136 (1955); Tumey v. Ohio, 273 U.S. 510, 532 (1927); Moore v. Dempsey, 261 U.S. 86 (1923); Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967) ("a fair hearing presupposes an impartial trier of fact . . . ."); Floyd v. State, 166 Miss. 15, 39, 148 So. 226, 232 (1933).

[10]*In re* Murchison, 349 U.S. 133, 136 (1955); Offutt v. United States, 348 U.S. 11, 14 (1954); Berger v. United States, 255 U.S. 22, 35-36 (1921); Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970); Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966); Amos Treat & Co. v. SEC, 306 F.2d 260, 267 (D. C. Cir. 1962); Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941).

[11]Tumey v. Ohio, 273 U.S. 510, 523 (1927). ("[I]t certainly violates the fourteenth amendment . . . [when] the judge . . . has a direct, personal, substantial pecuniary interest in reaching a conclusion against [defendant] in his case."). *Compare* Yazoo & M.V.R.R. v. Kirk, 102 Miss. 41, 58 So. 710 (1912), *with* Norwich Union

affected by pre-trial publicity[12] or selected by a process which systematically excluded some classes;[13] by an administrative agency with combined investigatory, prosecutory, and adjudicatory functions;[14] and by a judge who has been personally victimized by the defendant's offensive act.[15] The ability of verbally blistered officials to hear and decide impartially the case of a hypercritical teacher has also been questioned.[16] The teacher dismissal cases usually involve free speech and procedural due process considerations.[17] The courts have held that the 14th amendment "incorporates" fundamental substantive rights, including freedom

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Fire Ins. Co. v. Standard Drug Co., 121 Miss. 510, 93 So. 676 (1920). *See also* Johnson v. Mississippi, 403 U.S. 212, 215 (1971); Nadelmann, *Disqualification of Constitutional Court Judges for Alleged Bias?*, 52 JUDICATURE 27 (1968).

[12]Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); Moore v. Dempsey, 261 U.S. 86 (1923). *See also* Estes v. Texas, 381 U.S. 532 (1965) (television cameras in courtroom); Will, *Free Press and Fair Trial*, 40 MISS. L.J. 495 (1969).

[13]Harper v. State, 251 Miss. 699, 171 So. 2d 129 (1965); Farrow v. State, 91 Miss. 509, 45 So. 619 (1908). *But see* State v. Hall, 187 So. 2d 861 (Miss. 1966).

[14]Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966); Amos Treat & Co. v. SEC, 306 F.2d 260, 267 (D.C. Cir. 1962); T.S.C. Motor Freight Lines, Inc. v. United States, 186 F. Supp. 777, 790 (S.D. Tex. 1960), *aff'd sub nom.* Herrin Transp. Co. v. United States, 366 U.S. 419 (1961). *But see* FTC v. Cement Institute, 333 U.S. 683, 702-03 (1948) (asserting doctrine of necessity where no one other than the investigative agency is authorized to act).

[15]"No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971) (holding that a reviled judge must, if he waits until the trial's end defer, to another judge to set punishment for contempt); *accord,* Offutt v. United States, 348 U.S. 11 (1954); Cooke v. United States, 267 U.S. 517 (1925); United States v. Seale, 461 F.2d 345 (7th Cir. 1972); *cf.* Garrison v. Louisiana, 379 U.S. 64 (1964) where district attorney had charged local judges with inefficiency and laziness and was convicted by one of them of criminal defamation. *See also* Johnson v. Mississippi, 403 U.S. 212 (1971); Illinois v. Allen, 397 U.S. 337 (1970); Frank, *Disqualification of Judges,* 56 YALE L.J. 605 (1947); Note, *Summary Punishment for contempt: A Suggestion That Due Process Requires Notice and Hearing Before an Independent Tribunal,* 39 SO. CAL. L. REV. 463 (1966).

[16]Pickering v. Board of Educ., 391 U.S. 563, 578-79 n.2 (1968) (reversing the dismissal of teacher who had made public comments critical of school board's handling of revenue, and noting defects in hearing by same persons who were victims of the criticism and had brought the charges); *But see* Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970) (upholding dismissal of professor who used classroom time to discuss matters wholly unrelated to subject, even though board members who heard his case were also targets of his criticism). *See also* 1971 WIS. L. REV. 354.

[17]*See, e.g.,* Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Moore v. Winfield City Bd. of Educ., 452 F.2d 726 (5th Cir. 1971); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970); Pred v. Board of Pub. Instr., 415 F.2d 851 (5th Cir. 1969).

of speech, and immunizes them from state attack.[18] Yet some types of speech are not protected.[19] Where no substantive 14th amendment rights are at issue, courts have generally held that tenured teachers are entitled to a hearing before termination, but nontenured teachers are not.[20] In cases of governmental attempts to condition privileges (*e.g.*, public employment) on the nonexercise of constitutional rights, the distinction between "rights" and "privileges" has been rejected.[21] Thus, even though

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[18]West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Lovell v. City of Griffin, 303 U.S. 444, 450 (1938); DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652, 666 (1925); *see id.* at 672 (Holmes, J., dissenting); Canning v. State, 226 So. 2d 747 (Miss. 1969) (holding that the first eight amendments have been "absorbed" into the due process clause of the 14th). *See generally* Frankfurter, *supra*, note 7; Richter, *One Hundred Years of Controversy: The Fourteenth Amendment and the Bill of Rights*, 15 LOYOLA L. REV. 281 (1968-69).

[19](1) *Fighting words* - Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). *But see* Terminiello v. Chicago, 337 U.S. 1 (1949).

(2) *Obscenity* - Roth v. United States, 354 U.S. 476 (1957). *But see* Memoirs v. Massachusetts, 383 U.S. 413 (1966) (defining unprotected obscenity as having a dominant theme appealing to prurient interest, "patently offensive," and "utterly without redeeming social value"). *See also* Cohen v. California, 403 U.S. 15 (1971); (reversing breach of peace conviction for wearing jacket bearing obscene words) Comment, *Purging Unseemly Expletives from the Public Scene: A Constitutional Dilemma*, 47 IND. L.J. 142 (1971).

(3) *Libel* - Beauharnais v. Illinois, 343 U.S. 250 (1952). *But see* New York Times v. Sullivan, 376 U.S. 254 (1964) (libel of public officials not actionable unless made with "actual malice"). *See also* Garrison v. Louisiana, 379 U.S. 64 (1964) (applying *New York Times* standard to criminal defamation); Pickering v. Board of Educ., 391 U.S. 563 (1968) (applying *New York Times* standard to school board's retaliatory dismissal of critical teacher).

(4) *Speech presenting "Clear and Present Danger"* - Brandenburg v. Ohio, 395 U.S. 444 (1969); Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357, 372-78 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting); Schenck v. United States, 249 U.S. 47, 52 (1919). *See generally* Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg and Beyond*, 1969 S. CT. REV. 41.

[20]Perry v. Sindermann, 408 U.S. 593, 599 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972) (at least where termination causes no "stigma"); *cf.* Drown v. Portsmouth School Dist. 435 F.2d 1182 (1st Cir. 1970) (reasons required but no hearing); Pred v. Board of Pub. Instr., 415 F.2d 851 (5th Cir. 1969). *But cf.* Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir. 1969) (hearing not required for nontenured teacher unless reasons are stated). *But see* Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970) (hearing required if nontenured teacher has "expectancy" of continued employment).

[21]Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Perry v. Sindermann, 408 U.S. 593, 597-98 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); Pickering v. Board of Educ. 391 U.S. 563, 568 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 606 (1967); Sherbert v. Verner, 374 U.S. 398, 404 (1963). The right-privilege distinction originated with a statement by Mr. Justice Holmes in McAulifee v. Mayor

public employment is merely a privilege, and not a right, the government has not been given unlimited discretion in its decisions to terminate such privileges. The government may not terminate the privilege "on a basis that infringes [one's] constitutionally protected interests — especially, [one's] interest in freedom of speech."[22] This rule has been specifically applied to the nonrenewal of a nontenured teacher's contract.[23] Although first amendment protections are especially valuable in the educational arena,[24] the courts have stated that the teacher's interests as a commentator on public issues should be balanced with the state's interest in securing an orderly, efficient educational process.[25]

In the instant case, the court ruled that the President's cabinet could not be disqualified per se from reviewing Mrs. Duke's dismissal solely because its members were employees of the Board of Regents who had investigated the charges and initiated the action. The court found that the evidence produced by Mrs. Duke was inconclusive, and stated that absent a showing of actual bias or prejudice, the cabinet's conclusions should not be disturbed unless found to be unsupported by substantial evidence. The court therefore concluded that the cabinet was justified in ruling that Mrs. Duke's crude exercise of free speech had impaired her effectiveness as an instructor seriously enough to justify her dismissal.

Judge Godbold in a lengthy dissent said that the "apparent impartiality" test of *Ferguson v. Thomas*[26] had not been met by the tribunal in the instant case. Judge Godbold stressed that "apparent impartiality" refers to the competency of the tribunal to hear the matter, rather than the tribunal's actions once convened. Since the instant tribunal was the victim of the abusive statements, the investigator of the charges, and the

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of New Bedford, 155 Mass. 216, 220, 29 N.E. 517-18 (1892), and was unchallenged until Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947). *See generally* Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

[22]Perry v. Sindermann, 408 U.S. 593, 597 (1972); Pickering v. Board of Educ., 391 U.S. 563, 658 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Wieman v. Updegraff, 344 U.S. 183 (1952); Ferguson v. Thomas, 430 F.2d 852, 857 (5th Cir. 1970); Pred v. Board of Pub. Instr., 415 F.2d 815-57 (5th Cir. 1969).

[23]"[T]he nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights." Perry v. Sindermann, 408 U.S. 593, 598 (1972). *See* Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Ferguson v. Thomas, 430 F.2d 852, 857 (5th Cir. 1970).

[24]Healy v. James, 408 U.S. 169, 180 (1972); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 512 (1969); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Shelton v. Tucker, 364 U.S. 479, 487 (1960).

[25]Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Moore v. Winfield City Bd. of Educ. 452 F.2d 726, 728 (5th Cir. 1971); Ferguson v. Thomas, 430 F.2d 852, 859 (5th Cir. 1970); *cf.* Healy v. James, 408 U.S. 169 (1972); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506-07 (1969).

[26]430 F.2d 852, 856 (5th Cir. 1970).

instigator of the action being reviewed, it was not sufficiently detached from the controversy to meet the "apparent impartiality" test. He further stated that the majority's "actual partiality" test was not a plausible substitute for the more widely accepted "apparent impartiality" test. Since Judge Godbold felt that there was sufficient evidence in the record to support the district court's finding that the cabinet lacked the required detachment for apparent impartiality, he concluded that the appellate court was precluded from overruling such findings unless plainly erroneous.

The majority's requirement that actual prejudice be shown before the conclusions of an academic hearing body may be reviewed de novo in federal court will undoubtedly foster a greater degree of control by school administrators over school matters. To the extent that this greater control facilitates smoother school operations and more orderly and efficient education, the law has been improved by the *Duke* decision.[27] If, however, this greater control engenders arbitrariness or the use of fictitious reasons to cloak the otherwise impermissible stifling of criticism, the *Duke* decision has done the law a disservice.[28] If the hearing given Mrs. Duke is not to be invalidated for lack of apparent impartiality, it is difficult to imagine a hearing that *would* be invalid. The cabinet not only shared the brunt of Mrs. Duke's opprobrious epithets with the Regents,[29] but members of the cabinet, at the Regent's suggestion, also investigated the charges and made the initial dismissal decision.[30] If the college environment really is "peculiarly the 'marketplace of ideas,' "[31] then any opportunity presented to school officials to hamper the vigorous exchange of ideologies should be viewed with dismay. The majority's "actual prejudice" rule is such an opportunity, because under it the difficulty of proving an official's mental disposition[32] mitigates

[27]Shanley v. Northeast Indep. School Dist., 462 F.2d 960 (5th Cir. 1972). *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

[28]"When a violation of First Amendment rights is alleged, the reasons for dismissal . . . must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution." Board of Regents v. Roth, 408 U.S. 564, 583 (1972) (Douglas, J., dissenting). In a case strikingly similar to *Duke,* Justice Marshall noted for the Court that "we feel free to examine the evidence . . . completely independently and to afford little weight to the factual determinations made by the Board." Pickering v. Board of Educ., 391 U.S. 563, 578-79 n.2 (1968).

[29]Where the "trier of fact was the same body that was also the victim . . . and the prosecutor," the Court recognized the "obvious defects in the fact-finding process." Pickering v. Board of Educ., 391 U.S. 563, 578-79 n.2 (1968). "No one so cruelly slandered is likely to maintain that calm detachment required for fair adjudication." Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971).

[30]"It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact and that prior official involvement in a case renders impartiality most difficult to mantain." Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967). *See also* Pickering v. Board of Educ., 391 U.S. 563, 578-79 n.2 (1968).

[31]Healy v. James, 408 U.S. 169, 180 (1972).

[32]"[N]othing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient." Berger v. United States, 255 U.S. 22, 36 (1921).

directly against the chances of obtaining an independent review of the facts. In most cases, academic experts, rather than the courts, should make school decisions,[33] but when constitutional rights are infringed and the academic hearing body is not sufficiently detached from the controversy to possess apparent impartiality,[34] the reviewing court should be allowed to try the facts de novo.[35]

The district judge was on solid ground when he held that forbidding particular words entails a risk of suppressing ideas and is therefore impermissible.[36] The use of strong, even profane, language should not be penalized where the speaker feels that such language is necessary to convey his sincere convictions. Moreover, the district court's finding that no substantial university interest had been infringed was supported both by evidence and by precedent.[37] While the evidence conflicted as to the degree Mrs. Duke's teaching effectiveness was impaired, certainly the district judge's finding of no serious impairment was based more on an impartial evaluation of objective evidence than was the contrary conclusion of the cabinet and Regents.

In conclusion, the majority's positions on both the issues of procedural fairness and free speech are not supported either by precedent or policy. Adoption of Judge Godbold's interpretation of the requirement of apparent impartiality and the district judge's position on first amendment protection for strong language would have gone further toward keeping the academic "marketplace of ideas" open for business.

Eugene T. Holmes

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[33]Shanley v. Northeast Indep. School Dist., 462 F.2d 960 (5th Cir. 1972).

[34]Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970).

[35]Pickering v. Board of Educ., 391 U.S. 563, 578-79 n.2 (1968).

[36]Cohen v. United States, 403 U.S. 15 (1971).

[37]For a discussion of the interests of the individual and the school, *see* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

CONSTITUTIONAL LAW — CIVIL COMMITMENT PROCEEDINGS — DUE PROCESS REQUIRED

Petitioner was involuntarily committed to a Wisconsin mental institution.[1] She subsequently brought suit in Federal District Court for the Eastern District of Wisconsin[2] alleging[3] that Wisconsin's civil commitment statutes[4] were unconstitutional under the due process clause of the 14th amendment.[5] Declaratory and injunctive relief was sought.[6] The court found that substantial constitutional issues had been raised by the complaint, and a three-judge court was convened.[7] The three-judge court, *held*, relief granted. In civil commitment proceedings, no person may be committed to a mental institution without a right to timely notice of the charges and hearing, a right to a speedy preliminary and full hearing on the charges, a right to notice of a trial by jury, a right to counsel, a right to confrontation and cross-examination, a right to the privilege against self-incrimination, a right to exclude hearsay evidence, and the right of having the state bear the burden of proving that the defendant is both mentally ill and dangerous beyond a reasonable doubt. *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972).

In the American colonial period, laws regarding the insane focused on the financial plight of the individual rather than on healing his affliction.[8] As a continuation of the development of the English Elizabethen Poor Laws,[9] which provided local care for the poor, towns assumed an obligation to care for those persons who were members of the

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[1]The petitioner was involuntarily taken to the Mental Health Center North Division, in Milwaukee, by two police officers and was detained there for emergency observation pursuant to Wisconsin's civil commitment statutes.

[2]Petitioner brought a class action suit on behalf of herself and all persons 18 years of age or older who had been committed pursuant to Wisconsin's civil commitment statutes.

[3]Petitioner specifically alleged that the Wisconsin commitment statutes failed to accord her the due process guarantees of a right to timely notice of the charges, a right to timely notice of the hearings, a right to trial by jury, a right to counsel, a right to confrontation and cross-examination, a right of privilege against self-incrimination, a right to be committed only if proven insane beyond a reasonable doubt, a right to exclude hearsay evidence, and a right to provide a comprehensible standard upon which a person may be committed.

[4]WIS. STAT. §§ 51.02-.04 (Supp. 1972).

[5]U.S. CONST. amend. XIV.

[6]The petitioner sought declatory relief under 28 U.S.C. §2201 (1970), and injunctive relief under 42 U.S.C. § 1983 (1970). Although the court stated that jurisdiction was granted under 42 U.S.C. § 1983, it appears that such language was erroneous and that the statute is remedial and not jurisdictional.

[7]28 U.S.C. § 2281 (1970). This section requires the convening of a three-judge federal court to determine whether a state's statute is unconstitutional and to issue an injunction to restrain a state official from acting pursuant to the statute if the statute is found to be unconstitutional.

[8]D. ROTHMAN, THE DISCOVERY OF THE ASYLUM 4 (1971).

[9]A. DEUTSCH, THE MENTALLY ILL IN AMERICA 44 (1946).

community and unable to care for themselves.[10] As a result of the philosophies of the "Age of Enlightment" the American attitude towards the proper care for the mentally ill changed.[11] This change resulted in acceptance of the Enlightenment philosophy which proposed that a restructuring of the environment would cure mental illness.[12] It was suggested that the mentally ill would be cured by removing them from the community and placing them in an institutional environment.[13] However, a movement advocating the drafting of new commitment laws and picturing the medical superintendents as "evil men" pressured a few state legislatures into enacting new laws regarding commitment.[14] Responding to the call for stricter laws to safeguard the rights of individuals who were to be committed, a few state courts began to strictly enforce the due process rights of notice,[15] confrontation,[16] trial by jury,[17] and the right to detain only upon a showing of dangerousness.[18]

The majority of states, however, expanded their authority to commit an individual upon the theory that the state, as *parens patriae*, has the duty to care for the humane needs of its citizens.[19] It was this further expansion of the *parens patriae* doctrine, together with the pressure from the psychiatric community that eroded the then-developing due process safeguards.[20] Where some courts had previously adhered strictly

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[10]*Id.*

[11]N. DAIN, CONCEPTS OF INSANITY IN THE UNITED STATES 1789-1865 at 11 (1964). Dain relates that because of the advances in scientific and political thought, 18th century man was convinced that by environmental control man could improve his life.

[12]D. ROTHMAN, *supra* note 8, at 129.

[13]*Id.*

[14]A. DEUTSCH, *supra* note 9, at 423. Deutsch told about the famous commitment of Mrs. Packard, who was involuntarily committed to a mental institution at the insistence of her husband. Mrs. Packard was eventually released and started a movement for the drafting of commitment laws that would ensure procedural safeguards in commitment proceedings. *See* Ray, *Confinement Of The Insane,* 3 AM. L. REV. 193, 194 (1869).

[15]*E.g.,* Eddy v. People *ex rel.* Eddy, 15 Ill. 386, 387 (1854); *In re* Vanauken, 10 N.J. Eq. 186, 190 (Ch. 1854).

[16]*In re* Vanauken, 10 N.J. Eq. 186, 190 (Ch. 1854).

[17]Menifee v. Ends, 97 Ky. 388, 30 S.W. 881, 882 (1895); *see, e.g., In re* Conover, 28 N.J. Eq. 330, 331 (Ch. 1877).

[18]*See, e.g.,* Keleher v. Putnam, 60 N.H. 30, 31 (1880); Ayer's Case, 3 Abb. N. Cas. 218, 220 (N.Y. 1877).

[19]Most authorities believe that the state's power to commit is based upon the two principles of police power and *parens patriae. E.g.,* Taylor, *A Critical Look Into the Involuntary Civil Commitment Procedure,* 10 WASHBURN L.J. 237, 239 (1971).

[20]Ray, *supra* note 14, at 216. The author points out that the Association of Medical Superintendents of North American Hospitals for the Insane, unanimously sanctioned a project whereby persons could be committed simply upon certification of one or more registered physicians, and left to the legal process simply the acknowledgement of the genuineness of the signatures on the certificate.

to the due process rights of notice and confrontation,[21] the United States Supreme Court in *Simon v. Craft*,[22] and *Chaloner v. Sherman*[23] held that while notice and an opportunity to contest were essential elements of due process, the right of an allegedly mentally ill individual to confront his adversaries personally in court was not essential to due process.[24] While the federal courts acknowledged the right of an allegedly mentally ill person to fair notice and to a hearing on the charges,[25] they proceeded to relax the requirement of a speedy hearing and held that proceedings need only be held within a reasonable time.[26] This "reasonableness of time" doctrine appeared to allow prolonged detention for those allegedly dangerous mentally ill defendants in emergency situations, as long as the defendants were guaranteed a hearing at a later date.[27] In addition to the relaxation of the right to a speedy hearing and confrontation, the courts have also altered the nature of the conduct necessary for commital. Where some courts had previously allowed commitment only upon a showing of dangerousness,[28] others began committing persons who, though not necessarily dangerous, were simply in need of care and treatment.[29] Responding to this abridgement of rights, recent federal decisions indicate that the law will allow commitment only

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[21]Eddy v. People *ex rel.* Eddy, 15 Ill. 386 (1854); *In Re* Vanauken, 10 N.J. Eq. 186 (Ch. 1854).

[22]182 U.S. 427, 436 (1901).

[23]242 U.S. 455, 461 (1917).

[24]In *Simon,* Mrs. Simon acquired counsel to represent her, but she was physically prevented from attending the hearing pursuant to an Alabama statute which allowed a sheriff to confine an allegedly mentally ill defendant and prevent the defendant from attending his own trial, if, in the sheriff's discretion, the defendant was not in a fit condition to attend. The Supreme Court found this statute to be constitutional. In addition, the Supreme Court, in *Chaloner,* upheld a New York court decision where an allegedly mentally ill defendant had a committee of his person and estate appointed while he was involuntarily confined in a mental institution. The Supreme Court determined that the due process requirements were fulfilled when he was personally served with notice and rejected the defendant's contention that he was denied due process because he was physically prevented from attending the hearing.

[25]Barry v. Hall, 98 F.2d 222, 225 (D.C. Cir. 1938).

[26]*In re* Barnard, 455 F.2d 1370, 1374 (D.C. Cir. 1971).

[27]Miller v. Blalock, 411 F.2d 548, 549 (4th Cir. 1969); Fhagen v. Miller, 306 F. Supp. 634, 638 (S.D.N.Y. 1969), *federal court abstention* in 312 F. Supp. 323 (S.D.N.Y. 1970). In *Fhagen,* the defendant was detained 21 days for observation without a hearing, but the federal district court held this to be a valid restraint since the defendant could have a hearing at a later date.

[28]Ayer's Case, 3 Abb. N. Cas. 218 (N.Y. 1877).

[29]*In re* Hobart, 76 Ohio App. 80, 81, 145 N.E.2d 205 (Ohio Ct. App. 1956), *appeal dismissed,* 355 U.S. 21 (1957); *see* Sanchez v. State, 80 N.M. 438, 457 P.2d 370, 372 (1968), *appeal dismissed,* 396 U.S. 276 (1969). Although the Supreme Court in *Sanchez* intimates that the defendant was dangerous to himself, and therefore properly committed, the Supreme Court stated that persons simply in need of care and treatment could be legally committed.

upon a showing of dangerousness.[30] Another effort by the states to erode the developing due process safeguards was recognized in the abolition of a mandatory right to trial by jury in commitment proceedings. A federal court in *U.S. ex rel. Morgan v. Wolfe*[31] held

> It should be noted that the Fourteenth Amendment's due process clause does not impose a constitutional obligation upon the states to provide trial by jury in civil cases in general and involving the issue of insanity in particular.

The resultant change was brought about through psychiatric circles which claimed that it would be detrimental to the mentally ill patient to face a jury, since it would embarrass him and aggravate his condition.[32] The statutes in some jurisdictions, as a result of the influence of the psychiatric community have gone so far as to allow an allegedly mentally ill defendant a jury trial only upon demand.[33] In addition, although the Supreme Court has not spoken on the constitutional right to counsel in civil commitment proceedings, it appears that state curtailment of this right may be rendered unconstitutional in light of federal cases in similar situations.[34] In their role as *parens patriae*, the states, with the approval of at least one federal court,[35] have further tried to limit the due process requirement by declaring that commitment is justified upon a showing by a preponderance of the evidence that the accused is insane. The states have contended that this burden of proof is all that is necessary, because commitment proceedings are civil actions wherein the requirement of proof is a preponderance of the evidence. Although this requirement has met with some approval,[36] recent history indicates that where deprivation of liberty is at stake, the highest degree of proof, proof beyond a reasonable doubt, is necessary for confinement.[37] Merely calling a proceeding a civil action will not relax strict adherence to due process requirements. In addition, the states in commitment proceedings have introduced evidence of statements made by the defendant to the psychiatrists while failing to advise the allegedly mentally ill of his privilege against self-incrimination. While the courts have failed to speak to this issue, Justice Douglas, in a recent Supreme Court opinion implied that the fifth amendment protection against self-incrimination should apply in commitment proceedings.[38]

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[30] *E.g.*, Lake v. Cameron, 364 F.2d 657, 659 (D.C. Cir. 1966).

[31] 232 F. Supp. 85, 97 (S.D.N.Y. 1964).

[32] Comment, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L.J. 1178, 1193 (1947).

[33] *E.g.*, WIS. STAT. ANN. § 51.03 (1957).

[34] Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968); Dooling v. Overholser, 243 F.2d 825, 827 (D.C. Cir. 1957).

[35] *See* Tippet v. State, 436 F.2d 1153, 1159 (4th Cir. 1971), *cert. denied sub. nom.* Murel v. Baltimore Crim. Court, 407 U.S. 355 (1972).

[36] *Id.*

[37] *See In re* Winship, 397 U.S. 358, 365 (1970).

[38] McNeil v. Director of Patuxent Institution, 407 U.S. 245, 255 (1972) (concurring opinion).

In the instant case the court stated that since an adjudication of mental illness in Wisconsin carries with it a loss of basic civil rights and loss of future opportunity, the interests in avoiding civil commitment are at least as high as those of persons accused of criminal offenses. Therefore, the resulting burden on the state to justify civil commitment must be correspondingly high. The court then held that the Wisconsin civil commitment statutes,[39] which failed to provide the procedural safeguards necessary to sustain this burden, violated the due process clause of the 14th amendment. The court concluded that in civil commitment proceedings no person may be committed to a mental institution without a right to timely notice of the charges and hearing, a right to a speedy preliminary and full hearing on the charges,[40] a right to notice of a trial by jury, a right to counsel, a right to confrontation and cross-examination, a right to the privilege against self-incrimination,[41] a right to exclude hearsay evidence, and the right of having the state bear the burden of proving that the defendant is both mentally ill and dangerous beyond a reasonable doubt.

This decision reflects a current trend of the lower courts to protect the "fundamental rights" of all citizens, and also a return to older commitment decisions where the constitutional rights of due process were zealously guarded. The instant opinion and recent federal court decisions[42] indicate that a state's desire to aid those in need of psychiatric care cannot be manifested by depriving an individual of his constitutional rights. The instant opinion provides an excellent outline for states, including Mississippi, which need to revise their present civil commitment statutes. Revised statutes should be remedial rather than custodial, and they should be so structured as to allow both the legal and medical professions to work together to protect both the citizen's mental health and his constitutional rights. The need for revision in Mississippi is apparent since Mississippi's commitment statutes,[43] like the statutes in the instant case, provide scant due process protection: there are no provisions regarding a guaranteed right to notice of trial by jury, the right to counsel, or the right to a mandatory hearing. Moreover, the Mississippi statutes indicate that one who simply is in need of care and treatment and not necessarily dangerous may be committed. If the state legislatures, however, fail to draft new commitment laws, perhaps the only solution would be for the Supreme Court to create

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[39]WIS. STAT. ANN. §§ 51.02-.04 (Supp. 1972).

[40]The court ruled that the *maximum* period of time that a person may be detained pursuant to a commitment statute was 48 hours.

[41]U.S. CONST. amend. V.

[42]Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Dixon v. Attorney Gen., 325 F. Supp. 966 (M.D. Pa. 1971); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *modified,* 334 F. Supp. 1341 (M.D. Ala. 1971). In *Wyatt,* a federal district court in Alabama expanded the due process rights of those committed to include the right to have adequate treatment provided after being committed. *But see* Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972).

[43]MISS. CODE ANN. 6909-03 (1952); MISS. CODE ANN. §§ 6909-07, -08 (Supp. 1972).

standards in the area of mental health. Indeed, the Supreme Court appears to be headed in this direction.[44]

Although this decision goes a long way in guaranteeing due process safeguards in civil commitment proceedings, the ultimate solution in the mental health area will not be reached until we take a more realistic view of mental illness. The standards outlined may be too simplistic to be truly beneficial to those persons alleged to be mentally ill. The legal profession must realize that the Enlightenment philosophy of institutionalizing individuals to cure insanity has failed.[45] Therefore, perhaps the most helpful change in the field of mental health would be to discontinue the placement of persons in mental institutions in all cases except where the person has exhibited extremely dangerous behavior.[46] In other cases, perhaps the best solution would be to revert to the colonial period practice of having communities care for the mentally ill through outpatient clinics.[47] These clinics could be funded by money now spent on mental institutions.

Mark Phillip Rabinowitz

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[44]Jackson v. Indiana, 406 U.S. 715, 736-37 (1972). The Supreme Court, in *Jackson* stated, "The States have traditionally exercised broad power to commit persons mentally ill. . . . Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated."

[45]D. ROTHMAN, *supra* note 8, at 238. Rothman relates that the quick curative measures of the mental institution proved to be wrong as early as the late 19th century.

[46]This, of course, would not pertain to those persons who voluntarily commit themselves.

[47]It appears that Congress in passing the Community Mental Health Centers Act, Pub. L. No. 88-164, tit. II, 77 Stat. 290, as amended 42 U.S.C. § 2681-87 (1970), authorizing federal funding to community mental health centers, was responding to the need for community care for the mentally ill. However, the proposed federal budget for 1974, while attempting to provide approximately the same services to already existing mental health services, fails to provide funds for the continued construction of community mental health centers. Approximately 14 million dollars was spent on the construction of community mental health centers in 1973. It is senseless to cease construction of new mental health centers when the need for more centers is great. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, 1974-Appendix 379 (1973).

CONSTITUTIONAL LAW — CORPORAL PUNISHMENT — SCHOOL POLICY PERMITTING CORPORAL PUNISHMENT WITHOUT PARENTAL CONSENT IS NOT UNCONSTITUTIONAL

Plaintiffs[1] filed a class action in federal district court[2] seeking to enjoin defendant school officials from administering corporal punishment[3] in the Dallas Independent School District without the permission of parents.[4] Plaintiffs contended that such punishment violates their rights guaranteed by the eighth and 14th amendments to the Constitution. Defendants contended that the district's policy is the best measure available to maintain discipline among some students. The district court, *held,* where evidence does not show that a school district's policy authorizing the use of corporal punishment is arbitrary, capricious, unreasonable, or wholly unrelated to the competency of the state to determine its educational function, it is not violative of due process or of the protection against cruel and unusual punishment. *Ware v. Estes,* 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd mem.,* 458 F.2d 1360 (5th Cir. 1972), *cert. denied,* 409 U.S. 1027 (1972).

At common law the teacher had the right to administer corporal punishment based on the doctrine of *in loco parentis*[5] which defined the teacher's authority as a partial delegation of parental authority.[6] The rationale behind this doctrine is that in school discipline the teacher

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[1]The plaintiffs in the instant case were two minors represented by their fathers. Plaintiff Oliver was knocked unconscious by an assistant principal after supposedly directing an obscene remark at him.

[2]The class action, brought pursuant to FED. R. CIV. P. 23 (b), was on behalf of all parents and students of the Dallas Independent School District who were opposed to corporal punishment as a method of discipline.

[3]For the purposes of this note, corporal punishment is defined as any kind of physical punishment inflicted on the body of a student by school officials. *See* BLACK'S LAW DICTIONARY 408 (Rev. 4th ed. 1968).

[4]The school district is authorized to use corporal punishment by a Texas statute which immunizes teachers from assault and battery charges in the exercise of moderate restraint given by law to "the teacher over the scholar" as well as to "the parent over the child." TEX. PENAL CODE ANN. art. 1142 (1961).

Principals and assistant principals have authority to administer corporal punishment without parental consent although teachers may inflict such punishment only in the presence of another adult and only after receiving written permission from the child's parent. Ware v. Estes, 328 F. Supp. 657, 659 (N.D. Tex. 1971).

[5]Blackstone wrote that a parent could delegate his parental authority to the child's tutor or schoolmaster who stood *in loco parentis* (in the place of the parent) in order to discipline the child. *See* 1 W. JONES, BLACKSTONE 648 (1915). Although Blackstone wrote concerning the one to one relationship between a tutor and his pupil, the common law later incorporated this doctrine in establishing the modern public school teacher's privilege to exercise corporal punishment. *See* note 6 *infra.*

[6]John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); Richardson v. Braham, 125 Neb. 142, 249 N.W. 557 (1933); Marlar v. Bill, 181 Tenn. 100, 178 S.W.2d 634 (1944); Prendergast v. Masterson, 196 S.W. 246 (Tex. Civ. App. 1971); Clearly v. Booth [1893] 1 Q.B. 465.

stands in the place of the parent and has the right to use reasonable physical punishment to obtain the child's obedience.[7] A more recent development of the law holds that the duty to maintain classroom discipline is necessary to the educational process and that the teacher has authority, independent of parental authority, to punish in all situations directly affecting school order.[8] According to this principle the school board operates under a legislative delegation of authority.[9] Both lines of development demonstrate that the validity of school board regulatory power is based on its function of educating pupils in its charge.[10] Until recently there has been judicial deference to such regulation based on a faith in the quality of American education.[11] Thus, school board regulations have been consistently upheld on the grounds that they were not "clearly arbitrary and unreasonable."[12] The courts, however, have never explored whether the rules performed a proper educational function.[13]

A third line of development in this area of the law is based on constitutional grounds which balance the legality of school board rules against the student's rights under the first and 14th amendments.[14] The new standard is designed to insure that students will be accorded due process rights.[15] The due process standard first appeared in the area of school law in 1945 in *West Virginia State Board of Education v. Barnette*,[16] which held that freedom of speech demands that students be accorded the right to refrain from saluting the flag as a part of a required school ceremony.[17] The courts later applied this standard to school dress codes in determining whether dress regulations violated the students' right to due process.[18] In *Tinker v. Des Moines Independent*

[7] 5 WASHBURN L.J. 75, 77 (1965). For an exhaustive treatment of the *in loco parentis* doctrine *see* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non Constitutional Analysis*, 117 U. PA. L. REV. 373, 377-84 (1969).

[8] 15 HASTINGS L.J. 600, 601 (1964); *see, e.g.*, Cray v. Howard-Winneshick Community School Dist., 260 Iowa 465, 150 N.W.2d 84 (1967); Independent School Dist. v. Mattheis, 275 Minn. 383, 147 N.W.2d 374 (1966).

[9] Goldstein, *School Board Authority*, *supra* note 7, at 384.

[10] *Id.*

[11] Goldstein, *Reflections On Developing Trends In The Law Of Student Rights*, 118 U. PA. L. REV. 612, 613 (1970).

[12] Board of Directors v. Green, 259 Iowa 1260, 1267, 147 N.W.2d 854, 858 (1967); *see* State *ex rel.* Thompson v. Marion County Bd. of Educ., 202 Tenn. 29, 34, 302 S.W.2d 57, 59 (1957); McLean Indep. School Dist. v. Andrews, 333 S.W.2d 886, 888-89 (Tex. Civ. App. 1960).

[13] Goldstein, *Developing Trends*, *supra* note 11, at 613.

[14] Hudgins, *The Discipline of Secondary School Students and Procedural Due Process: A Standard*, 7 WAKE FOREST L. REV. 32, 33 (1970).

[15] *Id.* at 46; *see* 22 BAYLOR L. REV. 554, 558 (1970).

[16] 319 U.S. 624 (1945).

[17] Angerman, *Constitutional Defenses to a School Discipline Case*, 17 PRAC. LAW. 45, 48 (1971).

[18] Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Breen v. Kahl, 296 F. Supp. 702, 706 (W.D. Wis. 1969), *aff'd*, 419 F.2d 1034 (7th Cir. 1969); *see* Angerman, *supra* note 17, at 49; 22 BAYLOR L. REV. 554, 558 (1970).

Community School District,[19] the Court recognized a student's right to wear black arm bands to publicize his objection to the Vietnam war and stated that one's constitutional rights do not stop at the school house gate.[20] This expansion of rights, however, has not yet carried over to the area of corporal punishment.[21] Courts have refused to hear corporal punishment cases unless the victim of the punishment can show that the school board has acted maliciously, in bad faith, arbitrarily, or unreasonably in prescribing the punishment.[22] In making its decision the Court will honor any statute authorizing corporal punishment unless the punished student can show that the statute bears no reasonable relation to the educational function of the state.[23] Although some states are governed by statute, the majority, including Mississippi,[24] are guided by common law.[25] If state law is silent, the courts will honor the common law right of the teacher to chastise his pupils as long as the punishment is reasonable.[26]

In the instant decision, the court noted that under the doctrine of *Meyer v. Nebraska,*[27] the state cannot unreasonably interfere with the liberty of parents to direct the education of their children. The court further noted, however, that under the rule of *Prince v. Massachusetts*[28] these parental rights are not beyond limitation. Thus, relying on *Pierce v. Society of Sisters,*[29] the court found that passing judgment on the merits of corporal punishment as a means of discipline was outside its jurisdiction and held that in order for a deprivation of due process to occur, the policy of the school district must bear no reasonable relation

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[19]393 U.S. 503 (1969).

[20]*Id.* at 506.

[21]Sims v. Board of Educ., 329 F. Supp. 678 (D.N.M. 1971); *see* 50 N.C.L. REV. 911 (1972).

[22]Suits v. Glover, 260 Ala. 449, 71 So. 2d 49 (1954); Calway v. Williamson, 130 Conn. 575, 36 A.2d 377 (1944); Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889 (1941); Haycraft v. Grigsby, 94 Mo. App. 74, 67 S.W. 965 (1902); *see* 5 WASHBURN L.J. 75, 88 (1965).

[23]Pierce v. Society of Sisters, 268 U.S. 510, 535 (1924); *see* Goldstein, *Developing Trends, supra* note 11, at 612-13.

[24]The Mississippi Code is not explicit in its treatment of the subject. The statute provides that one of the teacher's duties is to maintain order in school, but it is silent as to the method of performing such duty. MISS. CODE ANN. § 6282-24 (Supp. 1972).

[25]5 WASHBURN L.J. 75, 88 (1965). It should be noted, however, that corporal punishment has been banned in Massachusetts (MASS. GEN. LAWS ANN. ch. 71, § 37G (Supp. 1973) and New Jersey (N.J. STAT. ANN. § 18A:6-1 (1968)).

[26]Cases cited note 22 *supra; see* 50 N.C.L. REV. 911 (1972).

[27]262 U.S. 390 (1922) (state law forbidding the teaching of any modern language other than English in public schools violates 14th amendment).

[28]321 U.S. 158 (1943) (state statute prohibiting minor accompanied by guardian from distributing religious literature on streets is not violative of 14th amendment).

[29]268 U.S. 510 (1925) (compulsory education act held to violate due process rights in depriving parents' right to send children to private schools possessing state accredited curriculum).

to some purpose within the competency of the state in its educational function. The court further found that where school policy is based on a state statute which authorizes teachers to inflict moderate corporal punishment and which immunizes them from assault and battery charges in the moderate use of such punishment, the school policy outweighs any claims based on parental rights. The court concluded that such authorized corporal punishment does not violate the eighth amendment's protection against cruel and unusual punishment.

By refusing to consider the decision in the instant case, the Supreme Court insures that corporal punishment will remain a fixture in thousands of American classrooms. Although the Court has placed a more substantial burden of justification upon the state in actions involving first amendment rights,[30] it has upheld corporal punishment as a reasonable means of school discipline and left the burden upon the student to show unreasonableness.[31] Once prevalent as a generally accepted means of controlling behavior, corporal punishment is officially sanctioned today only against children.[32] It is no longer authorized against sailors, apprentices, domestic servants, or convicts,[33] and the separate treatment accorded students has been criticized for some time.[34] In 1853 the Indiana Supreme Court declared:

> The husband can no longer moderately chastise his wife; nor . . . the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the school boy . . . should be less sacred in the eye of the law is not easily explained.[35]

The Indiana Court predicted that in time public opinion would lead to the abolition of corporal punishment in schools,[36] but the prediction has not come true. A 1970 Gallup poll reported that 62 percent of parents questioned believed in the reasonable use of corporal punishment in schools,[37] and a 1969 National Education Association poll found that 65 percent of elementary teachers favored its "judicious" use.[38] As evidenced by the instant case, courts generally are reluctant to involve themselves innovatively in questions of policy, although there are exceptions.[39] In contrast to public opinion, experts in the field of education

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[30]Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969) (right to wear black arm bands in war protest); *see* 6 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 583, 590 (1971); *cf.* Richards v. Thurston, 424 F.2d 1281 (1970) (right to wear long hair).

[31]Cases cited note 22 *supra.*

[32]6 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 583, 593 (1971); *see* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

[33]Jackson v. Bishop, 404 F.2d 571, 580-81 (8th Cir. 1968) (use of strap in Arkansas state penitentiary violates eighth amendment).

[34]*See* 6 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 583, 588 (1971).

[35]Cooper v. McJunkin, 4 Ind. 290, 292-93 (1853).

[36]*Id.* at 292-93.

[37]TIME, June 12, 1972, at 37.

[38]48 N.E.A. RESEARCH BULL. 48, 49 (1970).

[39]*See* Wallington, *Corporal Punishment in Schools,* 1972 JURID. REV. 124.

and child psychology have adopted the view that corporal punishment is a counterproductive means of achieving order in schools.[40] B. F. Skinner, a widely recognized authority on child psychology, asserts that corporal punishment has many unfortunate by-products which may lead students to attack teachers, become drop-outs, vandalize school property, and when they become voters, refuse to support education.[41] A National Education Association task force, while recognizing the enormous disciplinary problems that teachers face, has called for a prompt end to all corporal punishment.[42] The task force suggested that teachers be coached in better alternatives and said, " '[t]he weight of fact and reasoning [is] against the infliction of physical pain.' "[43] An English study found that a deterioration of behavior and an increase in delinquency are side effects of corporal punishment.[44] A most serious danger is that adults who inflict physical pain provide young misbehavers with models of violence which undoubtedly contribute to violent tendencies in later life.[45]

The frequency or severity of the punishment cannot be controlled by defining permissible punishment as that which is "reasonable." In *Jackson v. Bishop*,[46] Judge Blackmun noted that such regulations are easily circumvented and that there is a natural difficulty in enforcing the limits of the power to punish.[47] Not only is the practice inherently prone to abuse,[48] but there is sufficient evidence of *gross* abuse[49] to offset any positive effects from its "judicious" use. If a student is disrupting the classroom or endangering others, reasonable force to remove him is justified emergency action. Deliberately inflicting physical pain is not.

When school enrollments were small and teachers could build personal relationships, the *in loco parentis* doctrine was feasible. But as a result of the phenomenal growth in school enrollments, some schools have exceptionally bad communication channels and broad spans of student control.[50] This bureaucratic environment makes the *in loco parentis* doctrine inapplicable to many of today's modern school systems. Corporal punishment can be safely used only when the relationship between the teacher and student has been carefully constructed over a

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[40]*See, e.g.*, G. BLACKHAM & A. SILBERMAN, MODIFICATION OF CHILD BEHAVIOR 47-49 (1971); Nash, *Corporal Punishment In An Age of Violence*, 13 EDUCATIONAL THEORY 295, 302 (1963).

[41]B. SKINNER, THE TECHNOLOGY OF TEACHING, 95-103 (1968); B. SKINNER, SCIENCE AND HUMAN BEHAVIOR 182-93 (1953).

[42]NEWSWEEK, December 4, 1972, at 127.

[43]*Id.*

[44]Nash, *supra* note 40, at 301.

[45]AM. CIV. LIB. U., CORPORAL PUNISHMENT IN THE PUBLIC SCHOOLS 17 (1972).

[46]404 F.2d 571 (8th Cir. 1968).

[47]*Id.* at 579.

[48]Cooper v. McJunkin, 4 Ind. 290, 292 (1853).

[49]Ware v. Estes, 328 F. Supp. 657, 658 (N.D. Tex. 1971); *see* NEWSWEEK, May 17, 1971, at 99.

[50]Ladd, *Allegedly Disruptive Student Behavior and the Legal Authority of Public School Officials*, 19 J. PUB. L. 209, 220 (1970).

long period and rests upon mutual respect and genuine affection.[51] There are not many cases in modern public schools where it is used under such conditions. The probability that many children will suffer severely and unjustly warrants the abolition of corporal punishment.

It is noteworthy that the instant court said that defendant Estes testified at the trial that the Dallas School Policy reflects the philosophy of Skinner, *i.e.* in some cases corporal punishment will be helpful. Contrary to the court's statement, however, Skinner writes, "At no time have I ever recommended corporal punishment to anyone. I have never said it would be helpful."[52] The court's use of this false, hearsay testimony is surprising and not easily explained.

With an understanding of the harmful effects of corporal punishment[53] and an appreciation for the recently recognized constitutional status of students,[54] the instant court should have found the use of corporal punishment to be violative of due process and the protection against cruel and unusual punishment. At the minimum the court should have redefined the limits of reasonable corporal punishment and should have established guidelines assuring that the child's due process rights will be safeguarded. It is regrettable that the Supreme Court refused to consider the grave constitutional issues of this case. If petitioned to review the question again, the Court must find the use of corporal punishment to be unlawful if justice is to be accorded to thousands of American school children.

William L. Youngblood

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[51]Nash, *supra* note 40, at 305.

[52]Letter from B. F. Skinner to William L. Youngblood, Feb. 12, 1973.

[53]*See* notes 40-46 *supra.*

[54]*See* note 30 *supra.*

CONSTITUTIONAL LAW — DEFAULT IMPRISONMENT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT

The appellant, Joe W. McKinney, was convicted and fined $100 for the possession of beer.[1] As a result of McKinney's inability to pay the fine, the Circuit Court of Chickasaw County, Mississippi, sentenced him to a jail term which was sufficient to discharge the fine.[2] The appellant unsuccessfully moved for release on the grounds that incarceration for nonpayment of the fine due to his indigence[3] would violate his rights under both the state and federal constitutions. On appeal to the Mississippi Supreme Court, *held,* affirmed. Imprisonment for nonpayment of a fine is permissible so long as the imprisonment does not exceed the maximum jail term provided by the statute. *McKinney v. State,* 260 So.2d 444 (Miss. 1972).

Traditionally, the common law practice of imprisoning a person to insure payment of a fine has been upheld by American courts as a valid mode of enforcing a sentence.[4] The rationale behind this practice was shaken somewhat in *Griffin v. Illinois*[5] where the Supreme Court held that a state statute,[6] which denied appellate review to an indigent who could not pay for a required transcript, violated the due process and equal protection clauses of the 14th amendment.[7] The *Griffin* rationale was followed in several subsequent cases which attacked the imprisonment of indigent defendants for nonpayment of fines.[8] The Supreme Court finally considered the constitutional aspects of imprisonment of an indigent who is unable to pay his fine in the landmark decision of *Williams v. Illinois.*[9] In *Williams,* the accused was convicted of petty

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[1]MISS. CODE ANN. § 10208 (b) (Supp. 1972) provides that upon conviction of illegal possession of beer or wine one may be imprisoned for not more than 90 days and/or fined not more than $500.

[2]MISS. CODE ANN. § 7899 (1956). Under MISS. CODE ANN. § 7906 (1956), each convict receives a $3 credit on his fine. *See* Comment, *Installment Payments: A Solution to the Problem of Fining Indigents,* 24 U. FLA. L. REV. 173 n.56 (1971).

[3]The evidence adduced at the hearing on the appellant's motion showed that he had no money or property, that at a time before his arrest he earned $57 a week but that because of high blood pressure he could no longer work, and that while his appeal to the circuit court was pending, he earned $10 a week sweeping floors. Statement of the case for Appellant at 1, 2; McKinney v. State, 260 So. 2d 444 (Miss. 1972).

[4]Annot., 31 A.L.R.3d 926, 928 (1970); Note, *Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days,"* 57 CALIF. L. REV. 778, 779 (1969); Comment, *Installment Payments, supra* note 2, at 170 n.28.

[5]351 U.S. 12 (1956).

[6]ILL. ANN. STAT. ch. 38, § 1-7 (k) (1972).

[7]351 U.S. at 19.

[8]Note, *Imprisonment of Indigent for Non-payment of Fine Held Violation of Equal Protection,* 40 FORDHAM L. REV. 159, 160 (1971). A collection of cases dealing with the effect of a defendant's indigency on the validity of imprisonment as an alternative to payment of a fine appears at Annot., 31 A.L.R.3d 926 (1970).

[9]399 U.S. 235 (1970). Prior to *Williams,* default imprisonment had been considered by several state courts resulting in divergent decisions. Annot., 31 A.L.R.3d

theft and was given the maximum sentence of 1 year in jail and a $500 fine. The sentence provided that if the accused defaulted in payment of the fine, he would remain incarcerated until his fine had been worked off at the rate of $5 a day, as provided by statute.[10] The Court, speaking through Chief Justice Burger, concluded that imprisoning an indigent for a term *exceeding the statutory maximum* for involuntary nonpayment violated the equal protection clause of the 14th amendment.[11] Justice White,[12] concurring in a companion case, *Morris v. Schoonfield*,[13] went a step further:

> [t]he same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failure to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and *whether or not the jail term of the indigent extends beyond the maximum term that may be imposed* on a person willing and able to pay a fine.[14]

Later in *Tate v. Short*[15] the Court expressly adopted Justice White's language in *Morris*, and held that where a traffic court had no jurisdiction to impose a prison sentence for nonpayment of a fine, any imprisonment exceeded the statutory authority and was, therefore, a violation of the equal protection clause of the 14th amendment.[16]

The Mississippi Supreme Court first addressed itself to default imprisonment of an indigent in *State v. Hampton*,[17] holding that such incarceration did not constitute either cruel and unusual punishment nor imprisonment for nonpayment of a debt. Arguments that such a practice violated the equal protection and due process clauses of the 14th amendment were expressly rejected in Mississippi in the subsequent

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926, 931 (1970); Note, *Fines, Imprisonment, and the Poor, supra* note 4, at 795 n.126, 796 n.127. Constitutional arguments attacking this type of imprisonment have been based on: (1) equal protection and due process; (2) cruel and unusual punishment; (3) excessive fines; and (4) imprisonment for debt. *Id.* at 796, 807.

[10]ILL. ANN. STAT. ch. 38, § 1-7 (k) (1972). The federal government and every state except Delaware have statuatory authorization for default imprisonment. *See* Williams v. Illinois, 399 U.S. 235, 239, 246-54 (1970).

[11]399 U.S. 235, 243 (1970).

[12]Mr. Justice White was joined in his concurring opinion by Justices Douglas, Brennan, and Marshall. *See also* Justice Harlan's concurrence in Williams v. Illinois, 399 U.S. 235, 259 (1970).

[13]399 U.S. 508 (1970). In *Morris* several indigents were convicted of and fined for minor offenses and subsequently incarcerated for nonpayment. Some of the offenses were punishable only by fine.

[14]*Id.* at 508.

[15]401 U.S. 395 (1971), *noted in* 42 Miss. L.J. 265 (1971).

[16]401 U.S. at 399.

[17]209 So. 2d 899 (Miss. 1968). Hampton was an indigent defendant who was convicted of several misdemeanors. He was sentenced to 9 months in jail and an $800 fine. He served the 9 months but was unable to pay the fine.

case of *Wade v. Carsley*.[18] On appeal to the Fifth Circuit, *Wade* was dismissed as moot; but the companion case,[19] involving an indigent defendant who had received a similar maximum sentence, was reversed on the basis of *Williams* as being a violation of the equal protection and due process clauses.[20] The court said, however, that the state was not precluded from finding an alternative method of collecting an unpaid fine from an indigent.[21]

The Mississippi Supreme Court, in an opinion devoid of facts, distinguished the instant case from *Tate v. Short*[22] and *Williams v. Illinois*[23] both factually and as to the punishment involved. In distinguishing *Tate*, the court reasoned that since the statute in *Tate*[24] provided only for a fine, any imprisonment would be invalid. The court held that in the instant case the applicable statute[25] provides for both a fine and imprisonment, and therefore imprisonment could be imposed. In distinguishing *Williams*, the court reasoned that even though the statutes involved in both *Williams*[26] and the instant case were "and/or" statutes, providing for a fine and/or jail term, the court in *Williams* exceeded the statutory maximum time in its sentence. The court held that in the instant case the additional imprisonment would not exceed the statutory maximum, and that the sentence should be affirmed.[27]

In the present case it appears that the Mississippi Supreme Court completely ignored Justice White's language in *Morris v. Schoonfield*[28] which was *expressly* adopted in *Tate v. Short*.[29] This language suggested that the United States Supreme Court would find default imprisonment

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[18]221 So. 2d 725 (Miss. 1969). The defendant was convicted of disturbance of the peace and sentenced to 6 months in jail and a $500 fine. Upon nonpayment she was sentenced to an additional term to work off the fine at the rate of $3 per day.

It is interesting that the court relied on People v. Illinois, 41 Ill. 2d 511, 244 N.E.2d 197 (1969), which was subsequently reversed in Williams v. Illinois, 399 U.S. 586 (1970).

[19]Wade v. Carsley, 433 F.2d 68 (5th Cir. 1970). The *Wade* case was joined with a case styled *Thames v. Thomas*. The question before the court of appeals was whether the state had violated the Constitution by imposing imprisonment upon an indigent for inability to pay a validly imposed fine when additional imprisonment would extend the total incarceration beyond the maximum provided by state law. Thames was sentenced to the maximum jail term of 6 months and the maximum fine of $500. Upon default he was sentenced to serve an additional 166-2/3 days to work off the fine.

[20]433 F.2d at 69.

[21]*Id.* 69-70. Reference was made to n.21 of the *Williams* case.

[22]401 U.S. 395 (1971).

[23]399 U.S. 235 (1970).

[24]For a discussion of the statute, *see* 42 MISS. L.J. 265 (1971).

[25]MISS. CODE ANN. § 10208 (Supp. 1972).

[26]ILL. ANN. STAT. ch. 38, § 1-7 (1972).

[27]At the statutory rate of $3 per day, McKinney could work off his fine in 33-1/3 days, but a few extra days would be required to pay court costs.

[28]399 U.S. 508 (1970).

[29]401 U.S. 395, 398 (1971).

to be a denial of equal protection even in cases where the imprisonment is for a term less than the statutory maximum.[30] McKinney's imprisonment is admittedly less than the statutory maximum of 2 years, but the language of the Court in *Tate* appears to prohibit *any* default imprisonment. The only possible reason the lower court could have had in imposing default imprisonment was to insure collection of the fine. The court had already determined that there was no reason to imprison the appellant when it chose merely to fine him rather than to sentence him to jail. The question that arises is whether a judge who has determined that imprisonment will not serve any public or compelling governmental interest should be allowed to impose punishment in the form of incarceration. Incarceration subjects a convicted man to public disgrace and degradation of character.[31] Further, there can be no economic justification for the additional expense incurred by the state when an offender of a minor crime is imprisoned.[32] Fining, at the very least, should be predicated on a fair and rational basis, if not upon the offender's ability to pay. These considerations were apparently ignored in the present case.[33] The trial judge originally determined that society's interest did not compel the harshness of imprisonment and sentenced the appellant to pay a $100 fine, or one-fifth of the statutory maximum. Upon default, the "work off" jail term was imposed, which amounted to over 33 days of imprisonment or over one-third of the statutory maximum time.[34] As a result the appellant had to serve a greater sentence than was originally given, solely because he did not have the financial ability to pay the fine. This conversion from fine to imprisonment is certainly inequitable, if not arbitrary. The court's cryptic, 16-line opinion conceals the fundamental inequities of a decision which does violence to the spirit, if not the letter, of the law as enunciated in *Tate* and *Williams*.

It is not here suggested that the fine be simply forgotten when an indigent defendant cannot pay. An alternative method of collection, such as an installment or deferred payment plan similar to those adopted in other states,[35] could and should be initiated in Mississippi.

Walker W. (Bill) Jones

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[30]*See* Note, *Fining the Indigent*, 71 COLUM. L. REV. 1281, 1302 (1971).

[31]THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE TASK FORCE REPORT: THE COURTS 15 (1967).

[32]*Id.*

[33]*See* note 3 *supra*.

[34]MISS. CODE ANN. § 10208 (Supp. 1972).

[35]*See, e.g.*, CAL. PENAL CODE § 1205 (1970) (as applied to misdemeanors); MISS. GEN. LAWS ANN. ch. 279, § 1A (1972); MD. ANN. CODE art. 38, § 4 (a) (2) (Supp. 1972); N.Y. CODE CRIM. PROC. § 420.10 (4) (1) (6) (McKinney Supp. 1971); PA. STAT. ANN. tit. 19, § 1052 (1964); WASH. REV. CODE ANN. § 9.92.070 (1961).

CORPORATE TAXATION — SUBCHAPTER S — RECHARACTERIZED EQUITY WILL NOT NECESSARILY CONSTITUTE A SECOND CLASS OF STOCK

Appellee, a small business corporation taxed under Subchapter S of the Internal Revenue Code, contested the Commissioner's asserted deficiencies in its corporate income tax for fiscal years 1962 and 1963. The Commissioner contended that advances made to the corporation by its shareholders constituted a second class of stock. Accordingly, the Commissioner terminated the corporation's Subchapter S status and held it liable for the ordinary corporate income tax on its net earnings. The United States District Court for the Northern District of Mississippi held that the shareholder advances constituted contributions to capital, not loans. The court said that even though such advances should be recharacterized as equity, they would not result in a second class of stock and loss of Subchapter S status. On appeal to the Fifth Circuit Court of Appeals, *held*, affirmed and modified. Contributions to capital of a Subchapter S corporation which are recharacterized as equity will not necessarily become a second class of stock, resulting in the termination of Subchapter S status. *Amory Cotton Oil Co. v. United States*, 468 F.2d 1046 (5th Cir. 1972).

Subchapter S was enacted in 1958 under sections 1371-1378 of the Internal Revenue Code of 1954. These sections made it possible for businessmen "to select the form of business organization desired, without the necessity of taking into account major differences in tax consequences."[1] To be taxed under Subchapter S,[2] a corporation must be a small business corporation which does not: (1) have more than 10 shareholders;[3] (2) have as a shareholder a person (other than an estate) who is not an individual;[4] (3) have a nonresident alien as a shareholder;[5] or (4) have more than once class of stock.[6] Under Subchapter S the corporation is not subject to the corporate income tax, but instead its

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[1]S. Rep. No. 1983, 85th Cong., 2d Sess. 87 (1958).

[2]An election can be made only if all persons who are shareholders in the corporation consent to it. Once an election is made, it is effective for the taxable year for which it is made and for all succeeding taxable years. INT. REV. CODE of 1954, § 1372.

[3]*Id.*, § 1371 (a) (1), construed in Treas. Reg. § 1.1371-1 (d) (1).

[4]INT. REV. CODE of 1954, § 1371 (a) (2), *construed in* Rev. Rul. 63-226, 1963-2 CUM BULL. 341.

[5]INT. REV. CODE of 1954, § 1371 (a) (3).

This restriction reflects the fact that the corporate income is exempt from tax under Subchapter S on the assumption that it will be subjected to the graduated individual income tax rates, whereas some nonresident aliens are taxed under section 871 (a) (1) at the flat rate of 39%.

B. BITTKER & J. EUSTICE, FEDERAL TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 6.02 at 6-9 (3d ed. 1971).

[6]INT. REV. CODE of 1954, § 1371 (a) (4). The election is terminated however, if the corporation ceases to be a "small business corporation" as defined by section 1371 (a). *Id.* § 1372 (e) (2).

income is "passed through" and taxed directly to its shareholders.[7] The shareholders, therefore, are taxed on income which is *actually* distributed to them in the form of dividends and on the corporation's *undistributed* taxable income.[8] Under section 1374 an electing corporation may also "pass through" its net operating losses to the shareholders. This allows each shareholder to carry a portion of the corporation's net operating loss on his individual return and offset it against his personal income.[9] Section 1375 provides, however, that the right to make a nondividend distribution of previously taxed undistributed taxable income lasts only as long as the Subchapter S election remains in force.[10] Treasury Regu-

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[7] *Id.* § 1372 (b) (1), which states in part: "with respect to the taxable years of the corporation for which such election is in effect, such corporation shall not be subject to the taxes imposed by this chapter (other than the tax imposed by section 1378). . . ." The exemption includes the corporate income tax of section 11, the accumulated earnings tax of Section 531, and the personal holding company tax of section 541. B. BITTKER & J. EUSTICE, *supra* note 5, ¶ 6.05, at 6-16.

[8] INT. REV. CODE OF 1954, § 1373. Example: Corporation X, a newly formed enterprise, has current earnings and profits and taxable income of $20,000 in 1972. The corporation distributes a total of $12,000 in the form of actual dividends to its single shareholder *A* during the year. The remaining $8,000 is the corporation's *undistributed* taxable income for 1972 and is taxed to *A* as a dividend. This $8,000 on which *A* has been taxed but which he hasn't received, is credited to his previously taxed income account, and the basis of his stock in the corporation is increased by $8,000. *See* Note, *Shareholder Lending and Tax Avoidance in Sub-chapter S Corporation,* 67 COLUM. L. REV 495 (1967).

Under section 1375 (f) any distribution of undistributed previously taxed income made within 75 days of the close of the previous taxable year is treated as a distribution of the corporation's undistributed taxable income for the preceding year. This allows the corporation a grace period in which it can review and distribute its undistributed previously taxed income accounts to its shareholders.

[9] Under section 1374 (d) (1) it is treated "as a deduction attributable to a trade or business carried on by the shareholder." Section 1374 accomplishes one of the primary functions of Subchapter S: it allows shareholders who anticipate heavy losses in the formative years of a new enterprise to offset them against personal income where there would be no way of offsetting these losses at the corporate level.

Under section 1376 (b) the shareholder's basis for his stock is reduced by the net operating loss passed through to him. Once the basis of his stock is reduced to zero, section 1376 (b) (2) provides that the shareholder may apply the excess to reduce the basis of any corporate indebtedness held by him.

[10] Various other factors also come into play. Under section 1375 (d) (2) (B) (i) the shareholder's previously undistributed taxable income is reduced by the amount of the corporation's net operating loss attributed as a deduction to the shareholder. If corporate losses are incurred before the shareholder withdraws the undistributed dividend, the benefit of the tax-free distribution is lost. Any undistributed dividend accrued is personal to the shareholder and cannot be transferred; any subsequent buyer or donee would obtain no right to the undistributed previously taxed dividend. Treas. Reg. § 1.1375-4 (e) (1945). Similarly, when a shareholder dies, his estate is not entitled to the undistributed previously taxed dividends which may have accrued.

lation section 1.1371-1(g), as originally promulgated, provided that a Subchapter S corporation ran the risk of losing its special status if an instrument purporting to be a debt was actually stock.[11] In the 1966 case of *W. C. Gamman*,[12] the Tax Court interpreted the regulation to mean that the "proportionality" between the alleged debt and the stock was the exclusive test in determining whether more than one class of stock existed.[13] Subsequently, however, the Tax Court rejected this interpreta-

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It is, therefore, in the shareholder's best interest to withdraw this undistributed previously taxed income annually. *See* note 9 *supra*. However, under Treas. Reg. § 1.1375-4 (b), the distribution must be of money; a distribution of property will not qualify. A distribution of this kind usually becomes feasible only if a corporation can finance its operations without retained earnings. *See* Note, *"Locked-In Earnings"—How Serious a Problem Under Subchapter S?*, 49 VA. L. REV. 1516 (1963).

[11]Characteristics of debt include: (1) an unconditional obligation to pay a principal sum certain; (2) on or before a fixed maturity date not unreasonably far in the future; (3) with interest payable in all events and not later than maturity; (4) debt is not subordinated in priority to general creditors; and (5) the holder is not entitled to voting rights. Conversely, the characteristics of the stock include: (1) an excessively far-off maturity date, or no maturity date; (2) interest contingent on earnings or discretionary with the directors; (3) subordination of interest or principal to the claims of general creditors; (4) voting rights or the right to participate in management; and (5) restrictions on assignability. B. BITTKER & J. EUSTICE, *supra* note 5, ¶ 4.03, at 4-8.

As to the corporation the most substantial reason for preferring debt to equity is that the corporation will obtain a deduction under section 163 (a) for interest paid on debt, whereas dividends paid on stock or equity are not deductible. The corporate tendency to prefer debt to equity is modified in part by section 385. In determining whether a debtor-creditor or a corporation-shareholder relationship exists, one of the factors which the Commissioner considers is the ratio of debt to equity of the corporation. A ratio of 4 to 1 (debt to equity) is considered acceptable. *See* Hrusoff, *Election, Operation and Termination of a Subchapter S Corporation*, 11 VILL. L. REV. 1, 10-12 (1965).

[12]46 T.C. 1 (1966). Pre-Gamman cases include: Henderson v. United States, 245 F. Supp. 782 (M.D. Ala. 1965), in which the district court concluded that the election had been ineffective because the shareholders' loans to the corporation were actually contributions to capital; and Catalina Homes, Inc., 23 CCH Tax Ct. Mem. 1361 (1964), in which the Tax Court found that substantial shareholder loans constituted a second class of stock revoking the corporation's election under Subchapter S.

[13]Treas. Reg. § 1.1371-1 (g) provides in part:

> Obligations which purport to represent debt, but which actually represent equity capital will generally constitute a second class of stock. However, if such purported debt obligations are owned solely by the owners of the nominal stock of the corporation in substantially the same proportion as they own such nominal stock, such purported debt obligations will be treated as contributions to capital rather than a second class of stock.

For additional cases concerning this regulation, *see* August F. Nielsen Co., 27 CCH Tax Ct. Mem. 44 (1968); Milton T. Raynor, 50 T.C. 762 (1968); *cf.* Portage Plastics Co. v. United States, 301 F. Supp. 684 (W.D. Wis. 1969). In *Portage*, the Commission contended that notes issued to non-shareholders constituted a second class

tion in the 1970 case of *James L. Stinnett, Jr.*,[14] and held it to be invalid as applied. Although the court in *Stinnett* said that the "proportionality" test was inconsistent with the legislative intent of Subchapter S, it failed to articulate any substitute for the invalidated regulation.[15] In *Brennan v. O'Donnell*[16] an Alabama district court reiterated the Tax Court's holding in *Stinnett* and concluded that the regulation, which provided that disproportionately held debt-equity would disqualify a corporation from Subchapter S treatment, overreached the statute and was invalid. However, in *Portage Plastics Co. v. United States*,[17] the Seventh Circuit Court of Appeals held Treasury Regulation section 1.1371-1 (g) to be valid. The court found that the holders of purported debt obligations enjoyed preferential rights and that these obligations could be reclassified as equity and considered a second class of stock.[18]

In the instant case, the court adopted the reasoning in *Gamman* and *Stinnett* by stating that ". . . it must take into account that tax-wise the corporation [under Subchapter S] is different from a Subchapter C corporation."[19] The court stated that the statutory debt-equity ratio is a relevant consideration and should be applied in the instant case. The court further reasoned that in determining whether a second class of stock existed, additional factors must be taken into consideration: (1) "the general purpose of Subchapter S is to permit small businesses to select a form of organization without the necessity of taking into account major differences in tax consequences";[20] (2) the fact that the statutory framework anticipated that stockholders would make loans to Subchapter S corporations; and (3) that debt can be used to serve a valid purpose within the structure of Subchapter S.[21] The court then

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of stock. In refusing to extend the application of the regulation to the factual situation, the district court reasoned that

> the purposes of the one class of stock requirement, to avoid administrative complexities and to limit the advantages of Subchapter S status to small corporations, would not be served by a conclusion that the instruments in question constituted a second class of stock within the meaning of section 1371 (a) (4).

Id. at 694.

[14]54 T.C. 221 (1970), *noted in* 50 B.U.L. REV. 577 (1970).

[15]*Stinnett* has been narrowly construed to hold that "where the instrument is a simple installment note, without any incidents commonly attributed to stock, it does not give rise to more than one class of stock within the meaning of section 1371 merely because the debt creates disproportionate rights among the stockholders to the assets of the corporation." 54 T.C. at 232.

[16]322 F. Supp. 1069 (N.D. Ala. 1971).

[17]CCH 1973 STAND. FED. TAX REP. ¶ 9261.

[18]The Seventh Circuit Court of Appeals, sitting *en banc*, later reversed the decision upon rehearing.

[19]Amory Cotton Oil Co. v. United States, 468 F.2d 1046, 1051 (1972).

[20]*Id.* at 1051.

[21]*Id.* at 1051-52. It can be argued that the debt-equity controversy is irrelevant under Subchapter S. When income is "passed through" to the shareholder, it is treated as a dividend. Under Subchapter S, the deduction which is allowed by section 163 (a) to the corporation for interest paid on debt is lost.

held Treasury Regulation section 1.1371-1 (g), as amended, invalid both facially and as applied in the instant case. The court concluded that although the advances made by the shareholders were contributions to capital, they did not constitute a second class of stock within the meaning of section 1371 (a) (4).

It is clear that the court's decision in *Amory,* with its invalidation of Treasury Regulation section 1.1371-1 (g), reflects further refutation of the Commissioner's second class of stock argument.[22] The *Amory* court applied a dual test: the first inquiry is whether the purported debt should be reclassified as equity and the second is whether the reclassified equity is in fact a second class of stock. This dual test, although not unique, appears to ease the restrictions of Subchapter S requirements and should provide more certainty in their application. By holding that a second class of stock is not necessarily created just because a shareholder contributes additional equity, the court has allowed the taxpayer to be more flexible when planning the capital structure of a Subchapter S corporation. Furthermore, it should now be easier for small companies to receive additional capital from their shareholders without the termination of their Subchapter S status and the resulting "lock-in" of undistributed, previously taxed income. This should prove particularly beneficial to the small, thinly capitalized corporation, especially in its formative years.

In light of the instant decision the Seventh Circuit Couth of Appeals sitting en banc recently reconsidered and reversed its earlier ruling in *Portage Plastics Co. v. United States.*[23] The court concluded that advances to a tax-option corporation were contributions to capital and that this determination did not require a finding that a second class of stock existed. The concurrence of the Fifth and Seventh Circuits appears to have sounded the death knell for Regulation section 1.1371-1 (g)'s arbitrary formula as to what constitutes a second class of stock.

Marlane E. Chill

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[22]In Shores Realty Co. v. United States, 468 F.2d 572 (5th Cir. 1972), which was decided on the same day as *Amory,* the Fifth Circuit Court of Appeals concluded that advances made by stockholders were bona fide indebtednesses, and, even if they were not bona fide indebtednesses, they were some form of surplus that was not a class of stock so as to disqualify the corporation under Subchapter S.

[23]CCH 1973 STAND. FED. TAX REP. ¶ 9261.

CRIMINAL LAW — BAIL — CAPITAL OFFENSE EXCEPTION TO CONSTITUTIONAL BAIL GUARANTEE UNAFFECTED BY ABOLITION OF DEATH PENALTY

Appellant, who was held without bail pending action by the grand jury on a charge of murder, sought release on a writ of habeas corpus. The Mississippi Constitution of 1890 guarantees a nondiscretionary right to bail before conviction in all except capital offenses.[1] Appellant contended, *inter alia*, that since capital punishment had been abolished by the Supreme Court in *Furman v. Georgia*,[2] capital offenses no longer exist and, therefore, all cases are bailable as a matter of constitutional right. Appellant's request for bail was denied first at the preliminary hearing by the County Court of the First Judicial District of Hinds County and again by the Circuit Court of Hinds County in a habeas corpus proceeding. On appeal to the Mississippi Supreme Court, *held*, denial of writ of habeas corpus affirmed. The abolition of the death penalty in *Furman v. Georgia*[3] does not invalidate the capital offense exception to the right to bail, since a capital offense is any offense for which the legislature has authorized the infliction of the death penalty, even though capital punishment may no longer be constitutionally imposed. *Hudson v. McAdory*, 268 So. 2d 916 (Miss. 1972).

Although concern with the right of the accused to pretrial release had been a consistent theme in English legal history,[4] the American

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[1]MISS. CONST. art. 3, § 29 provides: "Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great."

[2]408 U.S. 238 (1972). The full meaning of Furman v. Georgia, together with its companion cases, Jackson v. Georgia, 408 U.S. 238 (1972), and Branch v. Texas, 408 U.S. 238 (1972), must await clarification in later cases. The nine separate opinions in the 5-4 decision covered more than 230 pages, and no member of the majority joined in the opinion of any other member of the majority. The Court did not specifically abolish capital punishment per se, but did condemn criminal provisions which allow the jury to exercise discretion in choosing to impose either the death penalty or some lesser sentence for an offense.

In any event, the court in the instant case assumes as a matter of course that capital punishment under the Mississippi homicide statute is now unenforceable. This view is probably correct, since MISS. CODE ANN. § 2536 (1956), provides for jury discretion in affixing either the death penalty or a sentence of life imprisonment in capital cases.

[3]408 U.S. 238 (1972).

[4]At early common law, bail was largely a matter of discretion with sheriffs, whose motives for granting pretrial release might vary from bribery, Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1139, 1155 (1972), to a general refusal to care for the prisoners. Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966 (1961). Abuses by sheriffs led to the first statutory regulation of bail practices, the Statute of Westminster I in 1275, which governed the bail activities of lower officials by establishing a hierarchy of bailable and nonbailable offenses. Although the Statute left higher courts, in particular the King's Bench, unaffected, it, together with a 1554 statute which outlined procedural matters, remained the basis of English bail law for over 500 years. 1 J. STEPHENS, HISTORY OF THE CRIMINAL OF ENGLAND 234-36

colonists moved quickly to provide even more stringent safeguards against imprisonment prior to conviction. Accordingly, in 1641 Massachusetts advanced the peculiarly American idea of a *nondiscretionary* right to bail before conviction except in the case of capital crimes.[5] In 1682 Pennsylvania incorporated the guarantee into positive law by stating, "that all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident or the presumption great. . . ."[6] The constitutions of Pennsylvania[7] and North Carolina[8] in 1776, the Northwest Territory Ordinance of 1787,[9] and the Judiciary Act of 1789[10] contained essentially the same language. Other states copied the Pennsylvania statute extensively throughout the next century with little modification,[11] and by 1962 38 states had substantially identical constitutional or statutory provisions concerning bail.[12] The guarantee

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(1883); MEYER, *supra,* at 1156. Three significant 17th century documents, the Petition of Rights in 1628, the Habeas Corpus Act in 1679, and the Bill of Rights in 1689, solidified the rights of Englishmen to pretrial release by respectively incorporating the guarantees of Magna Carta upon pretrial imprisonment, bringing the higher courts (including the King's Bench) under the provisions of the Statute of Westminster, and prohibiting excessive bail. Foote, *The Coming Constitutional Crisis in Bail,* 113 U. PA. L. REV. 959, 966-68 (1965).

[5]The Massachusetts Body of Liberties of 1641 included the first American bail guarantee:

> No mans person shall be restrained or imprisoned by any Authority what so ever, before the Law hath sentenced him thereto, if he can put in sufficient securities bayle or mainprise, for his appearance, and good behavior in the meane time, unlesse it be Crimes Capital, and Contempts in open Court, and in such cases where some expresse act of Court [*i.e.* legislature] doth allow it."

THE COLONIAL LAWS OF MASSACHUSETTS § 18, at 37 (W. Whitmore ed. 1889).

[6]5 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3052, 3061 (1909).

[7]Commonwealth v. Truesdale, 296 A.2d 829, 831 n.2 (Pa. 1972).

[8]Foote, *supra* note 4, at 975.

[9]JOURNALS OF THE CONTINENTAL CONGRESS 752-54 (July 13, 1787); Foote, *supra* note 4, at 970.

[10]Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 91.

[11]Foote, *supra* note 4, at 969. The provision entered the Mississippi Territory in the Act of Feb. 10, 1807, § 1, and became Section 17, Article 1 of the Mississippi Constitution of 1817.

[12]*See* Comment, *Criminal Procedure — Determination of Accused's Right to Bail in Capital Cases,* 7 VILL. L. REV. 438, 450 (1962).

The eighth amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Although the scope of the eighth amendment excessive bail provision has become a matter of increasing concern, most courts have agreed that it confers no absolute right to bail and certainly does not impinge upon the exercise of present state constitutional bail requirements. *See, e.g.,* Fernandez v. United States, 81 S. Ct. 642 (1961) (Harlan, Circuit Justice) Carlson v. Landon, 342 U.S. 524, 545 (1952); Mastrian v. Hedman, 326 F.2d 708 (8th Cir. 1964), *cert. denied,* 376 U.S. 965 (1964); Arsad v. Henry, 317 F. Supp. 162 (E.D.N.C. 1970). *But see* Foote, *supra* note 4; Note, *Preven-*

has been consistently interpreted as conferring an absolute right to bail before conviction in all noncapital cases, and a discretionary right which might be denied in capital cases[13] upon sufficient evidence of guilt,[14] since it was thought the threat of a death penalty would compel a released prisoner to flee.[15] The effect of the abolition of capital punishment on the right to bail in capital cases has not been a question limited to the post-*Furman* era. Legislation abolished the death penalty in a number of states prior to 1972,[16] and the issue often arose as to whether restrictions on bail could continue even though capital punishment was no longer permissible.[17] The problem was soon pinpointed as definitional.

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tive Detention Before Trial, 79 HARV. L. REV. 1489, 1489-1500 (1966). Arguments that a right to bail is implicit in the eighth amendment have for the most part gone unheeded by the courts. Note, *Preventive Detention,* 36 GEO. WASH. L. REV. 178, 181 (1967). Indeed, the question of any incorporation of the eighth amendment excessive bail provision on the states has not yet been answered in the affirmative. State v. Flood, 269 So. 2d 212, 214 n.1 (La. 1972); Note, *Preventive Detention Before Trial, supra,* at 1495; *see* Collins v. Johnston, 237 U.S. 502 (1915). In general, the effect of federal law on the ability of the states to determine the rights of the accused to bail is so minimal that it merits no further consideration here.

[13]*See, e.g., Ex parte* Ball, 106 Kan. 536, 188 P. 424 (1920); State v. Pett, 253 Minn. 429, 92 N.W.2d 205 (1958); Martin v. State, 97 Miss. 567, 52 So. 258 (1910); *Ex parte* Bridewell, 57 Miss. 39 (1879); Street v. State, 43 Miss. 1 (1870); *Ex parte* Wray, 30 Miss. 673 (1856); State v. Konigsberg, 33 N.J. 367, 164 A.2d 740 (1960); *Ex parte* Berman, 86 Ohio App. 411, 87 N.E.2d 716 (1949).

[14]A full discussion of the qualifying phrase "when the proof is evident or the presumption great" is beyond the scope of this note. The question of the degree of proof needed to bring the individual case within the constitutional exception has been answered variously by the courts. In Mississippi, the indictment raises a prima facie case of "evident proof or great presumption" which the defendant has the burden of removing. Prior to indictment, the burden of proof lies with the state, since no prima facie case against the defendant has been made. In either case, if a "well-founded doubt of guilt" remains, the proof is insufficient to deny bail. Huff v. Edwards, 241 So. 2d 654 (Miss. 1970); *Ex parte* Bridewell, 57 Miss. 39, 42-44 (1879); *Ex parte* Wray, 30 Miss. 673 (1856). For a general introduction into the area, *see* Comment, *Criminal Procedure — Determination of Accused's Right to Bail in Capital Cases, supra* note 12, at 438.

[15]Most men, it is argued, would forfeit any amount of property rather than hazard their lives at trial. *See, e.g.,* State v. Williams, 30 N.J. 105, 152 A.2d 9, 19 (1959); Commonwealth v. Truesdale, 296 A.2d 829, 835 (Pa. 1972); Note, *Preventive Detention Before Trial, supra* note 12, at 1492. *But see* Weiland & Jones, *Federal Procedural Implications of Furman v. Georgia: What Rights for the Formerly Capital Offender?,* 1 AM. J. CRIM. L. 318 (1972).

[16]By the date of the *Furman* decision, Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin had completely abolished the death penalty, while in New Mexico, New York, North Dakota, Rhode Island, and Vermont capital punishment had been repealed in almost all cases. Furman v. Georgia, 408 U.S. 238, 298 nn. 52-53 (1972).

[17]*In re* Welisch, 18 Ariz. 517, 163 P. 264 (1917); *Ex parte Ball,* 106 Kan. 536, 188 P. 424 (1920); State v. Pett, 253 Minn. 429, 92 N.W.2d 205 (1958); *In re* Perry, 19 Wis.

In order to be termed "capital," did an offense require the death penalty as a contingent punishment? Courts which considered the question concluded that the term "capital offense" had the well-established meaning of an offense which could be punishable by death.[18] Alternative definitions were rejected by noting, as did the Minnesota Supreme Court in *State v. Pett*,[19] that altering constitutional phrases having such clear meaning would have the effect of judicially amending that document.[20] After defining the offense in terms of a penalty, the courts consequently read bail guarantees as requiring bail for all offenses except those which could result in the death penalty. In states where capital punishment had been abolished by the legislature, the courts held that capital offenses were non-existent, and all crimes became absolutely bailable.[21]

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711 (1865); *see* Taglianetti v. Fontaine, 105 R.I. 596, 253 A.2d 609 (1969) (constitution in Rhode Island included restrictions on the right to bail for offenses punishable by life imprisonment); City of Sioux Falls v. Marshall, 48 S.D. 378, 204 N.W. 999, 1001 (1925). The abolition of capital punishment also affected other statutes which made special provision for the capital offender, and a few cases considered the question as it arose in other contexts. State v. Johnston, 83 Wash. 1, 144 P. 944 (1914) (extra peremptory challenges allowed for capital offenders); *Ex parte* Walker, 28 Tex. Ct. App. R. 246, 13 S.W. 861 (1889) (no capital punishment permitted for an offender under the age of 17 years).

[18]Cases cited note 17 *supra*. Scores of other cases had occasion to define the capital offense for reasons unrelated to the abolition of capital punishment. *See, e.g.*, Rakes v. United States, 212 U.S. 55, 56-57 (1909) (if capital punishment may be inflicted, the crime is capital); State v. Christiansen, 165 Kan. 585, 195 P.2d 592, 596 (1948) (if a person may be sentenced to death); Shorter v. State, 257 So. 2d 236, 238 (Miss. 1972) (any case where the permissible punishment is death); State v. Konigsberg, 33 N.J. 367, 164 A.2d 740, 742 (1960) (those for which the death penalty may be imposed); *Ex parte* Herndon, 18 Okla. Crim. 68, 192 P. 820 (1920) (where the punishment may be death).

In many states, the mandatory death sentence for certain crimes was made optional. Typically, the jury possessed discretionary power to affix either the death penalty or a sentence of life imprisonment. Defendants quickly contended that by authorizing the jury to choose a punishment of life imprisonment in lieu of the death penalty, the legislature had abolished the capital offense. The unanimous rejection of this argument by the courts was well expressed by the Mississippi Supreme Court: "Death is the rule, imprisonment the exception. An indictment, therefore, for a crime heretofore capital must still be regarded as an indictment for a capital offense . . . ." *Ex parte* Fortenberry, 53 Miss. 428, 430 (1876); *accord,* Fitzpatrick v. United States, 178 U.S. 304, 307 (1900); Commonwealth *ex rel.* Alberti v. Boyle, 412 Pa. 398, 400, 195 A.2d 97, 98 (1963).

[19]253 Minn. 429, 423-33, 92 N.W.2d 205, 207-08 (1958).

[20]*Id.; accord, Ex parte* Ball, 106 Kan. 536, 188 P. 424, 426 (1920).

[21]*Ex parte* Ball, 106 Kan. 536, 188 P. 424 (1920); State v. Pett, 253 Minn. 429, 92 N.W.2d 205 (1958); City of Sioux Falls v. Marshall, 48 S.D. 378, 204 N.W. 999 (1925); State v. Johnston, 83 Wash. 1, 144 P. 944 (1914); *In re* Perry, 19 Wis. 711 (1865). That the judges were not always happy with this turn of events is evidenced by the vitriolic majority opinion in *In re* Welisch, 18 Ariz. 517, 163 P. 264, 265 (1917):

> The people of Arizona at the last election . . . abolished capital punishment for murder, so that now all persons charged with the crime of murder,

These decisions, however, were predicated on a *legislative* abolition of capital punishment.[22] In the last of the pre-*Furman* cases, *People v. Anderson*,[23] the California Supreme Court judicially invalidated the death penalty as unconstitutionally cruel and unusual punishment while simultaneously retaining the capital offense. The California court said that the term capital offense referred to a category of offenses of such gravity that the legislature had attached to their commission certain consequences, including the death penalty and restrictions on the right to bail. That one of those consequences could no longer be constitutionally imposed did not negate the underlying gravity of the offense which justified curbs on the right to bail. The seriousness of the offense, not its permissible punishment, classified a crime as capital. With that seriousness unimpaired by a judicial pronouncement, bail remained constitutionally deniable in cases involving crimes classified as capital by the California legislature.[24] By utilizing the *Anderson* classification analysis and the legislative-judicial distinction implicit in it, several post-*Furman* decisions retained the capital offense and perpetuated restrictions on the right to bail.[25] Others employed the traditional definition of the term as a function of capital punishment and removed it from operative existence, making all offenses in their jurisdictions bailable by right.[26]

In the instant case the court found that retention of the capital offense was necessary to the orderly administration of criminal statutes incorporating that and similar terms.[27] Noting that the classification of

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however diabolical or atrocious it may be, and howsoever evident may be the proof of guilt thereof, as well as all other crimes not punishable with death, may, before conviction, demand admission to bail as a strict legal right, which no judge or court can properly refuse.

[22]*See* cases cited note 17 *supra*.

[23]6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

[24]*Id.* at 657 n.45, 493 P.2d at 899-900 n.45, 100 Cal. Rptr. at 171-72 n.45.

[25]*See* People *ex rel.* Dunbar v. District Ct. of the Eighteenth Judicial Dist., 500 P.2d 358, 359 (Colo. 1972) ("Our Constitution has defined a class of crimes which permits the denial of bail."); State v. Flood, 269 So. 2d 212, 214 (La. 1972) ("Furman v. Georgia does not destroy the system of classification of crimes in Louisiana. The crime remains unchanged; only the penalty has been changed."); State v. Holmes, 269 So. 2d 207, 209 (La. 1972) ("[W]e conclude that we should . . . interpret Article 7, Section 41 of the Louisiana Constitution as referring to classes of crimes . . . .").

[26]State v. Aillon, 295 A.2d 666 (Conn. 1972); Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972); State v. Johnson, 61 N.J. 351, 294 A.2d 245 (1972); Edinger v. Metzger, 32 Ohio App. 263, 290 N.E.2d 577 (1972); Commonwealth v. Truesdale, 296 A.2d 829, 832 (Pa. 1972); *Ex parte* Contella, 485 S.W.2d 910 (Tex. Crim. App. 1972).

[27]Statutes containing references to the capital offense include: Miss. Code Ann. §§ 1795 (1956) (special venire in capital cases), 2017 (penalties for attempted capital and noncapital crimes), 2520 (12 peremptory challenges allowed in capital cases while only six permitted in other crimes), 2505 (copy of indictment and list of special venire to be delivered to the defendant one day before trial), 2505-2 (Supp. 1972) (two counsel may be appointed for indigent capital defendants).

crimes as capital is a proper legislative function, the court concluded that a capital offense is any offense for which the legislature has provided the death penalty, even though capital punishment could no longer be constitutionally imposed. The court further concluded that, despite the abolition of capital punishment in *Furman,* bail might still be constitutionally denied in cases involving capital offenses "when the proof is evident or the presumption great."[28]

Justice Patterson, writing for the dissenting justices, emphasized that the punishment inflicted has served as the definitive test of a capital offense in virtually all cases, and therefore *Furman* effectively eliminated capital offenses from the law of the state. Justice Patterson further stated that with the exception to the constitutional right to bail expunged, all offenses are bailable. Further, the dissent warned, neither the courts nor the legislature has the right to amend the constitution by redefining unequivocal terms. The dissent concluded that a speculative fear of confusion in the administration of criminal statutes was insufficient to justify a reconstruction which would serve to punish presumably innocent individuals before conviction.

The instant decision arose as part of a nationwide reaction to the abolition of capital punishment in *Furman.*[29] Although *Hudson* represents a departure from the traditional method of examining the capital offense and the right to bail, it is by no means a unique approach. At least three other states have, since *Furman,* begun classifying crimes as capital according to their legislatively determined nature.[30] Conceptions of public policy may have played a role in the doctrinal exodus. As a result of *Furman* many states that had legislated special procedural rights for the capital offender in contexts other than bail[31] have been left clutching possibly obsolete and contradictory criminal statutes. Although it appears unlikely that these statutes will long remain in their present form, in the interim many courts will be tempted to adopt a rationale which mitigates disturbance in the system of criminal justice, at least until legislatures revise statutes which now refer to capital offenses. An alternative result is also possible. In Mississippi and other states in which courts have preserved the status quo by sustaining the viability of the capital offense, legislatures could adopt

[28]Justice Smith concurred in the majority opinion. The invalidation of the death penalty "through the interposition of federal power" did not, in his opinion, alter the legislative definition of the capital offense. 268 So. 2d 916, 927 (Miss. 1972).

[29]*See* cases cited notes 25 & 26 *supra.*

[30]*See* cases cited note 25 *supra.*

[31]*See, e.g.,* ALA. CODE tit. 15, § 318 (1959) (compensation and duties of appointed counsel in capital cases); FLA. STAT. ANN. § 913.10 (1973) (providing for a 12-member jury in capital cases, and a six-member jury in all other criminal cases); LA. CODE CRIM. PRO. ANN. arts. 782 (unanimous verdict required in capital cases), 791 (sequestering of jury in capital cases), 798 (1969) (allowing challenges of jurors for cause by the state in capital cases on grounds that the juror has scruples against capital punishment); MASS. GEN. LAWS ANN. ch. 274, § 6 (penalties for attempt of crimes punishable by death), ch. 268, § 1 (1970) (penalties for perjury in capital and noncapital cases).

a laissez-faire attitude toward present criminal statutes and allow special treatment of the capital offender to continue. A legislative failure to purge from the statutes all traces of the capital offense would render the existence of important procedural rights granted to selected defendants contingent upon retention by the courts of a tenuous definition of the capital offense. It appears even more likely that some legislatures will reinstate a mandatory death penalty for limited offenses in an attempt to satisfy the command of *Furman*. Assuming the validity of such an approach, a restoration of the death penalty would moot the holding in the instant case by making the separate definitions of the capital offense coextensive once again.

The immediate effect, however, of the instant decision may well be to reinforce, rather than lessen, the total protection given the individual accused of an offense formerly punishable by death. Since the capital offense is also preserved in those statutes which provide additional safeguards for the accused, capital defendants retain their rights to six additional peremptory challenges, a special venire together with additional time to investigate the indictment and prospective jurors, and two appointed attorneys in case of indigency instead of the one allowed for the ordinary defendant.[32] These rights would have vanished had the traditional definition of the capital offense been employed. Yet, are these benefits still appropriate? The legislature certainly did not intend to grant preferential treatment to those accused of capital crimes because of the abhorrent nature of their offense. Rather, the severity and finality of the penalty awaiting the accused prompted the added safeguards. Since the basis for their existence has been abolished, the extra rights possessed by the erstwhile capital offender might equitably be removed.

The present decision rests on weak conceptual underpinnings. For over a century, capital punishment has been considered a prerequisite to the capital offense. The Supreme Court of Pennsylvania set forth the orthodox view in *Commonwealth v. Truesdale*:[33] "After intensive study and reflection we rule that the constitutional phrase 'capital offense' is a definition of a penalty, *i.e.*, the death penalty . . . ." The question is not one of first impression in Mississippi. In 1856, the Mississippi Supreme Court, while speaking of the capital offense exception to the right to bail, said, "But if the offense is not shown by evident proof or *great* presumption to be one *for the commission of which the law inflicts capital punishment* bail is not a matter of mere discretion with the court, but of right to the prisoner."[34] This clear statement of the vital connection between the death penalty and the right to bail was reinforced in *Ex parte Fortenberry*[35] where it was said that an offense for which the death penalty may be imposed remains capital until the jury, by fixing a sentence of life imprisonment, divests it of its capital quality. Less than a year before the

[32] *See* statutes cited note 27 *supra*.

[33] 296 A.2d 829, 832 (Pa. 1972).

[34] *Ex parte* Wray, 30 Miss. 673, 679 (1856).

[35] 53 Miss. 428, 430 (1876).

Hudson decision, this same court stated flatly that "[a]ny case where the permissible punishment is death is a capital case . . . ."[36] By this line of cases, Mississippi had long been among the states defining the capital offense in terms of the death penalty. Moreover, until the watershed *Anderson* footnote,[37] the abolition of capital punishment was universally held to render all offenses bailable as a matter of absolute right. That the earlier abolitions of capital punishment were legislative rather than judicial is clearly immaterial to the logic of the cases. By characterizing the issue as a new question begotten by *Furman,* and by ignoring conceptual precedents in favor of speculative consequences, the court here implicitly conceded the doctrinal weaknesses in its decision.

Even more compelling reasons exist for adopting the result opposite to that reached in the instant case. The entire thrust of American bail law centers around the right of the individual to be free of discretionary punishment prior to a formal adjudication of guilt. Thus, most state constitutions define bail in terms of a nondiscretionary right abridged only for pressing exigencies in capital offenses where the proof is evident or the presumption great.[38] Bail is denied to those accused of capital crimes for the same reason that a bail bond is required for release in noncapital cases, *i.e.,* to insure the presence of the accused at trial.[39] Justification for the denial inhered solely in the severity and irrevocability of the death penalty. Without a possible capital punishment, the flight motive is now so attenuated that the accused's presence may be reasonably assured by the posting of a bail bond. To the extent that the law denies bail for any reason other than to secure the presence of the accused at trial, the individual is effectively punished for an offense of which he stands unconvicted. Also, preparation for his defense is seriously impaired.[40] Indeed, the only public policy argument which might rationally be advanced for a continuing denial of pretrial release in the absence of capital punishment revolves around preventive detention. Although it has been contended that protection of society from future depredations by the accused has always been a conscious motive in the denial of bail in capital cases,[41] the case law provides no

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[36]Shorter v. State, 257 So. 236, 238 (Miss. 1972).

[37]6 Cal. 3d at 657 n.45, 493 P.2d at 899-900 n.45, 100 Cal. Rptr, at 171-72 n.45 (1972).

[38]Cases cited note 13 *supra.*

[39]*See* Royalty v. State, 235 So. 2d 718, 720 (Miss. 1970); Note, *Preventive Detention, supra* note 12; Note, *Preventive Detention Before Trial, supra* note 12, at 1492.

[40]Note, *Bail: An Ancient Practice Reexamined,* 70 YALE L.J. 966, 969 (1961).

[41]Weiland & Jones, *Federal Procedural Implications of Furman v. Georgia: What Rights for the Formerly Capital Offender?,* 1 AM. J. CRIM. L. 318 (1972).

Federal law, however, clearly recognizes a preventive detention logic. The Bail Reform Act, 18 U.S.C. § 3148 (Supp. 1972), provides in part:

> A person (1) who is charged with an offense punishable by death . . . shall be treated in accordance with the provisions of section 3146 (providing for the right to bail in noncapital cases) unless the court or judge has

support for this conclusion. Moreover, preventive detention remains a controversial and perhaps unconstitutional measure which should not be unilaterally imposed by the judiciary.[42]

The court in the instant decision followed the doctrinal path blazed by the California court in *Anderson*. The idea that the capital offense is defined, not by the punishment inflicted for its commission, but by legislative classification was used as the conceptual tool to retain the capital offense and thereby continue exceptions to the right to bail. However, the theoretical ramifications of the decision apparently interested the court less than the practical consequences it believed would flow from the adoption of the traditional position. In effect, the court said that the *Furman* decision created difficulties in construing existing criminal statutes; therefore, the effects of that decision were minimized by a redefinition of the capital offense. Aside from the impropriety of judicially amending the constitution by a redefinition of terms,[43] this decision is unsatisfactory on its own premises. Any confusion in present criminal statutes could be easily rectified by legislative amendment, and a continuation of restrictions on the right to bail after removal of the raison d'etre of those restrictions violates fundamental concepts of American bail law.

W. Wayne Drinkwater

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reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist . . . the person may be ordered detained.

[42]For discussion on preventive detention *see* Mitchell, *Bail Reform and the Constitutionality of Pre-trial Detention,* 55 U. VA. L. REV. 1223 (1969); Tribe, *An Ounce of Prevention: Preventive Justice in the World of John Mitchell,* 56 U. VA. L. REV. 371 (1970); Note, *Preventive Detention Before Trial, supra* note 12; Note, *Bail: An Ancient Practice Reexamined,* 70 YALE L.J. 966 (1961).

[43]State v. Pett, 253 Minn. 429, 432-33, 92 N.W.2d 205, 207-08 (1958).

TORTS — DOMESTIC RELATIONS — WIFE HAS INDEPENDENT RIGHT TO RECOVER PARENTIAL DAMAGES IN A CHILD INJURY SUIT

Nonresident plaintiffs, husband and wife, brought a diversity negligence action[1] in federal district court to recover for loss of their child's earnings and services, for the mother's personal nursing services, and for medical expenses resulting from injuries to their unemancipated minor son. The child was severly injured when, left unattended by his father, he attempted to cross a highway and was struck by defendant's truck.[2] The defendants contended that the sole right to sue for parental damages is vested in the father, and that any damages should be reduced by his negligence under the Mississippi comparative negligence statute.[3] The plaintiffs contended that the mother, who was not negligent, had a separate and independent right to an unmitigated recovery of all damages incurred by her.[4] The Federal District Court for the Northern District of Mississippi adopted the defendants position and reduced the total damages awarded plaintiffs by two-thirds.[5] On appeal to the Fifth

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[1]The suit was brought in the United States District Court for the Northern District of Mississippi under the court's diversity jurisdiction. The plaintiffs were citizens of Indiana and the defendants were citizens of New Jersey and Mississippi.

[2]The district court, sitting without a jury, concluded that the father had failed to exercise ordinary care in placing a child of such tender years in what any reasonable man would recognize as a precarious position—alone and unattended near a heavily traveled highway. The court found that this lack of care was a major contribution to the cause of the child's injuries. Wright v. Standard Oil Co., 319 F. Supp. 1364 (N.D. Miss. 1970).

[3]MISS. CODE ANN. § 1454 (1956) provides that in all actions brought for personal injury or death, the contributory negligence of the plaintiff will not constitute a bar to recovery, but that damages will be diminished in proportion to the amount of negligence attributed to the plaintiff. *See* Anderson v. Eagle Motor Lines, Inc., 423 F.2d 81, 83 (5th Cir. 1970); 1 T. COOLEY, A TREATISE ON THE LAW OF TORTS 568 (3d ed. 1906).

[4]The appellants also contended that the husband should be absolved of his negligence under the last clear chance doctrine. Both courts rejected this argument under the Mississippi rule that the tortfeasor must have "actually discovered and actually realized" the injured party's peril before the doctrine will be enforced. Illinois Cent. R.R. v. Underwood, 235 F.2d 868, 877 (5th Cir. 1956), *cert. denied*, 352 U.S. 1001 (1957). The district court found that the driver of the truck had not been aware of the child's presence before the accident occurred, and, therefore, had no conscious knowledge of the child's peril. *See* RESTATEMENT (SECOND) OF TORTS § 479, at 530-31 (1965).

[5]The court, recognizing that no "fixed rule" existed to assess the relative amounts of negligence of each party, found as a trier of fact that the father's negligence was twice that of the truck driver. Wright v. Standard Oil Co., 319 F. Supp. 1364, 1373 (N.D. Miss. 1970). Thus the court reduced the total damages of $187,104.92, which included $6000.00 for the child's earnings and services and $115,760.00 for the wife's nursing services, by a factor of two-thirds in computing the final award of $62,368.31.

Circuit Court of Appeals, *held,* reversed in part and remanded in part.[6] Under Mississippi law, in a joint action by a husband and wife seeking to recover for injuries to their child, the wife has a separate and independent right to recover full compensation for her personal services or expenses and an equal interest in the child's lost earnings and services. *Wright v. Standard Oil Co.,* 470 F.2d 1280 (5th Cir. 1972).

When an unemancipated child is negligently injured, two separate causes of action arise against the tortfeasor: one in the child for personal injuries and pain, and one in the parent for damages to the family relationship.[7] Although the parental action was recognized at common law,[8] it was vested solely in the father as the legally superior figure of the family unit.[9] In addition, the mother's right to sue was barred on procedural grounds, since her separate legal rights ceased to exist upon marriage.[10] This barrier was removed in the middle 19th century by numerous state legislatures with the passage of Married Women's Acts which gave the wife recognition as a legal entity with the right to sue

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[6]The district court decision was reversed as to the wife's recovery of compensation for her nursing services and an equal share of the child's earnings and services. The determination of proper recovery of the medical expenses was remanded for further hearings by the district court in light of the recognition of the wife's potential right of recovery.

[7]Generally these damages take the form of additional expenses necessary in supporting the injured child and the loss of the minor child's future earnings and services. In early cases, it was necessary for the parent to actually show that the child was performing valuable services in order for the action to be heard, but this requirement has become an insignificant formality today. *See* Stewart v. Gold Medal Shows, 244 Ala. 583, 14 So. 2d 549 (1943) (loss of actual services no longer required); Birmingham Ry., Light & Power Co. v. Baker, 161 Ala. 135, 49 So. 755 (1909); Ellington v. Ellington, 47 Miss. 329 (1872); Huft v. Khun, 277 S.W.2d 552 (Mo. 1955); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 703 (1938); Annot., 10 A.L.R.2d 1060, 1066 (1953); Foster, *Relational Interests of the Family,* 1962 U. ILL. L. F. 493.

[8]Norton v. Jason, 82 Eng. Rep. 809 (K.B. 1653).

[9]Fairmount & A. Street Passenger R.R. v. Stutter, 54 Pa. 375 (1867). Under the Biblical and common law family unit theory, the status of the wife was in all practicality that of a superior servant to the father. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124, at 873 (4th ed. 1971). Thus the father had a legally protected right to the services of the child. Since the wife, while the husband was living, was said to have no legal rights to the child's services, it follows that she could not bring the action as she had no legally protected interest on which she could sue. Pyle v. Waechter, 202 Iowa 695, 210 N.W. 926 (1926); Soper v. Igo, Walker & Co., 121 Ky. 550, 89 S.W. 538 (1905). *See generally* McKay, *Is a Wife Entitled to Damages for Loss of Consortium,* 64 DICK. L. REV. 57 (1959).

[10]Thompson v. Thompson, 218 U.S. 611 (1910); Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951); W. BLACKSTONE, COMMENTARIES 453 (Tucker ed. 1803); Keegan, *The Family And Tort Actions,* 1962 U. ILL. L.F. 557.

and be sued.[11] Most courts, however, continued to deny the existence of the woman's right to recover for negligent damage to family relationships.[12] While some courts have recognized the mother's right to recover for parental damages when the father has deserted,[13] is dead,[14] or imprisoned,[15] the majority of the courts have allowed only the father to sue in the normal family situation.[16] These decisions are based upon

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[11]MISS. CODE ANN. § 451 (Supp. 1972), which states:

> Married women are fully emancipated from all disability on account of coverture; and the common law as to the disabilities of married women and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman . . . but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of all property . . . and to make any contract in reference to it, and to bind herself personally, and to sue and be sued, with all the rights and liabilities incident thereto, as if she were not married.

See 3 C. VERNIER, AMERICAN FAMILY LAWS §§ 167, 179, 180 (1935), for a summary of Married Women's Acts in all states.

[12]*See* Chitcoter & McBride, *Wife's Claim For Loss Of Consortium*, 27 INS. COUNSEL J. 384 (1960); McKay, *supra* note 9. A striking example of the courts reluctance to recognize a married woman's right of action in family relation torts is illustrated by the history of the action for loss of the companionship and services, or consortium of an injured spouse. Although the husband's right of recovery had been almost unanimously upheld, not a single jurisdiction, with the exception of North Carolina, recognized the right of a wife to recover for loss of her husband's companionship until Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950). Subsequently, Mississippi became one of the first states to adopt this new rule. Delta Chevorlet Co. v. Waid, 211 Miss. 256, 51 So. 2d 443 (1951). The most common policy arguments of those jurisdictions still failing to recognize the wife's legal right to this family relationship are that the Married Women's Acts did not create a new cause of action in the wife for a right not recognized at common law. Other jurisdictions indicated the fear of double recovery for the husband's injuries if the wife's rights were recognized. 21 OHIO ST. L.J. 687 (1960). *See, e.g.*, McKay, *supra* note 9; Simeone, *The Wife's Action For Loss Of Consortium—Progress Or No?*, 4 ST. LOUIS U.L.J. 424 (1957); Comment, *Judicial Treatment Of Negligent Invasion Of Consortium*, 61 COLUM. L. REV. 1341 (1961).

[13]McGahey v. Albritton, 214 Ala. 279, 107 So. 751 (1926); Coleman v. Dublin Coca-Cola Bottling Co., 47 Ga. App. 369, 170 S.E. 549 (1933). *But see* Beigler v. Chamberlin, 138 Minn. 377, 165 N.W. 128 (1917) (law creates implied promise by father who abandons to pay for support of child).

[14]Martin v. City of Butte, 834 Mont. 281, 86 P. 264 (1906). *But see* American Steel & Wire Co. v. Tynan 183 F. 249 (3rd Cir. 1911) (construing Pennsylvania law, court held that statute authorizing wife's suit when father abandons does not authorize her suit when father dies).

[15]Trinity County Lumber Co. v. Conner, 187 S.W. 1022 (Tex. Civ. App. 1916).

[16]*E.g.*, Buhler v. Cohn, 31 Ga. App. 463, 120 S.E. 785 (1923); Nicholas v. Harvey, 206 Ky. 112, 266 S.W. 870 (1924); Ober v. Crown Heights Hosp., 138. N.Y.S.2d 190 (Sup. Ct. 1954); White v. Holding, 217 N.C. 329, 7 S.E.2d 825 (1940). *See also* King v. Southern Ry., 126 Ga. 794, 55 S.E. 965 (1906) (father's action not transferred to mother upon his death); Gilley v. Gilley, 79 Me. 292, 9 A. 623 (1887).

two surviving common law principles of the father's superior position in the family: that the father alone is legally entitled to the services of his child,[17] and that the father's primary duty of support establishes his right to recover damages incurred by the family.[18] Many states, however, have altered these common law maxims by legislation which equally distributes the parental rights and duties.[19] Statutes which equalize the parents' rights to services of the child have been interpreted as giving the married woman a legally enforceable claim to an equal share of the injured child's services and earnings.[20] Likewise, in jurisdictions specifically equalizing the parents' obligation to support a child,[21] a growing number of courts have recognized a legally protected claim for recovery of parental expenses in the mother.[22] Thus, recent decisions in these jurisdictions have allowed the mother to recover for her services and expenses occasioned by a child's injuries when such damages are personally identifiable to her.[23] Although Mississippi has

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[17]*E.g.*, Cohen v. Sapp, 110 Ga. App. 413, 138 S.E.2d 749 (1964); Doyle v. Rochester Times-Union, 249 N.Y.S. 30 (App. Div. 1931); Smith v. Hewett, 235 N.C. 615, 70 S.E.2d 825 (1952); White v. Holding, 217 N.C. 329, 7 S.E.2d 825 (1940); *cf.* Leahy v. Morgan, 275 F. Supp. 424 (N.D. Iowa 1967).

[18]Buhler v. Cohn, 31 Ga. App. 463, 120 S.E. 785 (1923); Ober v. Crown Heights Hosp., 138 N.Y.S.2d 190 (Sup. Ct. 1954); Smith v. Hewett, 235 N.C. 615, 70 S.E.2d 825 (1952). *See also* Alvery v. Hartwig, 106 Md. 254, 67 A. 132 (1907).

[19]For a summary of typical state statutes affecting parental rights *see* 4 C. VERNIER, *supra* note 11, §§ 232, 234, 265 (1936).

[20]Standard Dredging Corp. v. Johnson, 150 F.2d 78, 81 (5th Cir. 1945) (construing MISS. CODE ANN. § 399 (Supp. 1972) as given both parents equal rights to earnings of son in wrongful death action); Pangborn v. Central R.R., 32 N.J. Super. 289, 108 A.2d 276 (App Div. 1954) (construing N. J. REV. STAT. 9:1-1 as giving both parents equal rights to recover services but father only recovers for expenses; *cf.*, Williams v. Legree, 206 So. 2d 13 (Fla. Dist. Ct. App. 1968).

[21]The language of a Mississippi statute is typical of those interpreted as conferring on a wife an equal duty to support her children. MISS. CODE ANN. § 399 (1956) provides in part:

> The father and the mother are joint natural guardians of their minor children and are equally charged with their care. . . . The father and mother shall have equal powers and rights, and neither parent has any right paramount to the right of other concerning the custody of the minor or the control of the services or the earnings of such minor. . . .

[22]Southwestern Gas & Elec. Co. v. Denny, 190 Ark. 934, 82 S.W.2d 17 (1935); Winnick v. Kupperman, 29 App. Div. 2d 261, 287 N.Y.S.2d 329 (App. Div. 1968); *see* Pokeda v. Nash, 47 N.Y.S.2d 954 (Sup. St. 1944).

[23]Armstrong v. Onufrock, 341 P.2d 105 (Nev. 1959); Bush v. Bush, 95 N.J. Super. 368, 231 A.2d 245, 251 (Law Div. 1967) (allowing mother to recover hospital expenses for child where mother had expended her own money); Winnick v. Kupperman, 287 N.Y.S.2d 329 (App. Div. 1968). *See also* Skollingsberg v. Brookover, 26 Utah 2d 45, 484 P.2d 1177 (1971), where the court recognized that the father should normally bring a suit to recover parental damages for an injured child, but stated that this rule was applied for procedural purposes. Thus the court allowed the mother to bring the suit as a trustee for the benefit of her immigrant husband who spoke little English.

such a statutory provision, the specific question of a mother's right to recover these personal service damages has never been adjudicated in a reported state decision.[24] Perhaps the most significant advance in the area of women's family relationship actions has been the recent emergence of 14th amendment arguments[25] in actions for loss of consortium[26] of a negligently injured spouse. Currently, one state and two federal jurisdictions have held that refusal of the wife's claim while recognizing the husband's claim is an unconstitutional denial of due process[27] and equal protection.[28] Although married women's actions for recovery of losses as a wife and as a parent differ, the two rights of family relationships have been similarly compared.[29] At a minimum, these holdings, coupled with the recent Supreme Court decision in *Reed v. Reed*,[30] which rendered a statutory preference of males over females as administrators of their child's estate unconstitutional, further indicate a potential trend toward full recognition of a mother's rights in family relationship torts.

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[24]MISS. CODE ANN. § 399 (1956). For the text of this statute, *see* note 21 *supra*. Although the wife's right of action was not an issue in the case, the Mississippi Supreme Court has stated that "[m]edical and hospital expenses of a minor are obligations and debts of the father [and] where the father has incurred or paid them, he has the right to bring a separate suit for them." Lane v. Webb, 220 So. 2d 281, 285 (Miss. 1969).

[25]U. S. CONST. amend. XIV, § 1, which states in part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Although application of the equal protection argument in this area of the law is somewhat recent, it appears to have been first raised in an early dissenting opinion. *See* Bernhardt v. Perry, 276 Mo. 612, 632, 208 S.W. 462, 467 (1918) (dissenting opinion).

[26]Consortium is a term used to describe the right and legal interest of a husband and wife to the mutual enjoyment of each other's companionship and aid, and includes the husband's right to services of his wife. BLACK'S LAW DICTIONARY 382 (Rev. 4th ed. 1968). *See generally* Cox v. Cox, 183 So. 2d 921 (Miss. 1966); Luppman, *The Breakdown Of Consortium*, 30 COLUM. L. REV. 651 (1930).

[27]Umpleby v. Dorsey, 10 Ohio Misc. 288, 227 N.E.2d 274 (1967).

[28]Karczewski v. Baltimore & O.R.R., 274 F. Supp. 169 (N.D. Ill. 1967) (applying Indiana law); Owen v. Illinois Baking Corp. 260 F. Supp. 820 (W.D. Mich. 1966, *noted in* 19 ALA. L. REV. 551 (1967), *Contra*, Krohon v. Richardson-Merrill, Inc., 406 S.W.2d 166 (Tenn. 1966), *cert. denied*, 386 U.S. 970 (1967); Seagraves v. Legg, 147 W. Va. 331, 127 S.E.2d 605 (1962). In *Owen*, after discussing the modern social advancement of women in the marriage relationship, the court stated, "[T]o grant a husband the right to sue on this right [loss of consortium] while denying the wife access to the courts in the assertion of this same right is too clearly in violation of the Fourteenth Amendment equal protection guarantees to require citation of authority." *Id.* at 821.

[29]Hayward v. Yost, 72 Idaho 415, 242 P.2d 971 (1952); H. CLARK, THE LAW OF DOMESTIC RELATIONS § 7.2, at 261 (1968).

[30]404 U.S. 71 (1971), *noted in* 43 MISS. L.J. 418 (1972).

In the instant case, after determining that Mississippi law should be applied,[31] the court stated that the father's duty to support did not, in itself, make him the sole owner of the parent's cause of action.[32] Considering each element of parental damage separately, the court noted that under section 399 of the Mississippi Code, both parents were equally entitled to the earnings and services of their child. Therefore, the court concluded that the mother has an equal parental interest in her child's earnings and services, and that she should recover one-half of these damages. The court then stated that section 399 of the Mississippi Code, which also provides that a mother and father are equally charged with the care of their child, did not alone provide a basis for the mother's claim to the compensation awarded for her nursing services. The court, however, reasoned that section 399, coupled with Mississippi constitutional[33] and statutory provisions[34] emancipating women from all com-

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[31]The court first determined that state law rather than federal law should be applied in this diversity case. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Appellees had argued that since the appellants were domiciled as a family in Indiana, the law of that state should be applied in the instant case as it affects family relationships in which the state has an interest. This argument was advanced by appellees since IND. CODE ANN. § 2-217 (1968) provides that only a father ,while living, can sue for parental damages in child injury actions. The court in the instant case rejected this argument, saying that Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968) had indicated that Mississippi courts would look to all equitable factors in multistate tort actions to determine the law to be applied. Here, the court noted that the Indiana policies would not be furthered in applying their law in Mississippi courts and further, that the Indiana statute in question might involve a difficult 14th amendment constitutional question. Thus the court concluded that in view of these equitable factors and the fact that the tort had been committed in Mississippi, the state court would apply Mississippi law. *See* 43 MISS. L.J. 382 (1972) for a discussion of Mississippi choice-of-law decisions in multi-state tort suits.

[32]In support of their contention that the father had the sole right of action, the appellees cited a number of Mississippi divorce decisions holding the father "primarily" liable for the continued support of his children after his divorce or separation. *See* McInnis v. McInnis, 227 So. 2d 116 (Miss. 1969); Rasch v. Rasch, 250 Miss. 885, 168 So. 2d 738 (1964); Pass v. Pass, 238 Miss. 499, 118 So. 2d 769 (1960). In examining these decisions, the court concluded that even though the cases labeled the father's duty as "primary" in a divorce or separation setting, these decisions did not directly support nor require the conclusion that a father was the sole owner of the parent's cause of action in a child injury suit.

[33]MISS. CONST. art. 4, § 94 which provides in part, "The legislature shall never create by law any distinction between the rights of men and women to acquire, own, enjoy and dispose of property. . . . Married women are hereby fully emancipated from all disabilities on account of coverture." *See* Austin v. Austin, 136 Miss. 61, 71, 100 So. 591, 592 (1924), in which this constitutional provision was interpreted as having been "enacted for the purpose of striking down the inequalities existing between husband and wife. The intent was to put the wife on the exact equality with her husband—to emancipate her from the common law slavery of her husband."

[34]MISS. CODE ANN. § 451 (Supp. 1972). *See* note 11 *supra* for text of this statute.

mon law disabilities, indicates a strong state policy that a woman's rights are not to be reduced by marriage.[35] The court further noted that to allow the mother's separate claim would be consistent with the Mississippi rule that marriage alone does not impute the negligence of a husband to his wife.[36] The court concluded that since extra nursing services were not a part of a woman's normal family duties,[37] and therefore not a part of the consortium of the husband, she should be allowed to separately recover full compensation for the value of the services.[38]

Under the common law theory of parental recovery in child injury suits, the courts have been generally reluctant to recognize a mother's claim since this would require a finding of an equal duty of support in the mother. The instant case, however, offers a favorable alternative approach. In recognizing the wife's parental right of recovery, the court based its decision on equitable principles of married women's equality rather than primary and secondary parent-child relationships. Thus, the court was able to allow the mother to recover while leaving undisturbed the father's primary duty to support. By approaching the problem of a mother's right to damages on an individual, rather than family relationship basis, the logic of the instant decision appears to produce additional advantages. It enables the mother to recover, in addition to an equal share of the loss of earnings and services, only those damages personally identifiable to her. Thus, a potential procedural problem of recognizing an equal right of action in both parents for all collateral damages is avoided. The approach taken by the court in the instant case can be adopted in jurisdictions that have recognized the father's primary duty to support children in divorce and separation cases and still produce equitable recovery in proper situations without altering the father's duty

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[35]As further evidence of this view of Mississippi policy, the court cited Cooke v. Adams, 183 So. 2d 925 (Miss. 1966) in which the Mississippi Supreme Court took judicial notice of a "clearly discernible nation-wide trend, of both state and federal legislation, to expand rather than restrict the economic and personal emancipation of women. . . ." *Id.* at 926-27.

[36]*See, e.g.*, Woodward v. St. Louis-San Fran. Ry., 418 F. 2d 1305 (5th Cir. 1969); Marr v. Nichols, 208 So. 2d 770 (Miss. 1968). This is the generally accepted rule in the majority of jurisdictions today. *See* F. HARPER & F. JAMES, *supra* note 7, § 8.9, at 640 (1956); RESTATEMENT (SECOND) OF TORTS § 494A (1972); Harbison, *Family Responsibility in Tort*, 9 VAND. L. REV. 809 (1956); *Symposium on the Law of Domestic Relation in Oklahoma*, 14 OKLA. L. REV. 279, 327-29 (1961).

[37]The court described the very extensive daily nursing care that the child, now a paraplegic, required from his mother. The child is incapable of performing any acts of his own, must be tended at intervals throughout the night, and constantly watched and cared for by his mother.

[38]As to the collateral hospital and medical expenses, the court concluded that since the record did not indicate which parent had contracted for their payment, and since the wife could if she had made such an agreement recover these losses, disposition of this element of damages could not be propertly determined. Accordingly, this issue was remanded to the district court for the collection of additional evidence.

to his family. Finally, this theory of recovery for parental expenses incurred by the married woman provides an equitable and just rule that will help restore a sense of direction in an area of the law that is currently muddled with conflicting statutory, common law, and equitable principles. Although the instant decision was founded on Mississippi law and policy, the court's individual rights approach indicates an unmistakable preoccupation with underlying equal protection considerations. This is further evidenced by the court's admission that denial of the wife's claim would raise significant constitutional questions in light of the Supreme Court's recent decision in *Reed v. Reed*.[39] This language is significant because it represents the first judicial reference to the 14th amendment as a basis for a wife's parental action in a child injury suit. Thus, the instant decision will add new impetus to the current judicial trend of utilizing the federal constitution to guarantee equal recognition of a married woman's legal interests in the family relationship.

William L. Colbert, Jr.

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[39]404 U.S. 71 (1971). Although the court found it unnecessary to "squarely face" this constitutional issue in the instant case since the wife's claims could be recognized using Mississippi law, the court declared that its disposition of the case was made with an "awareness that a different result would raise significant constitutional questions." Wright v. Standard Oil Co., 470 F.2d 1280 (5th Cir. 1972). Also, in determining the conflict of laws issue in the instant case, the court noted that the Indiana statute which gave the father a preferential right to sue might "contravene the equal protection clause of the 14th amendment under the rationale of *Reed v. Reed*." *Id.* at 9.

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